

# The Judicial Vesting Option: Opting Out of Nomination and Advice and Consent

TUAN SAMAHON\*

*It is a well-worn mantra that our judicial selection process is broken, not only because senators may exercise their advice and consent power in ways that seek to direct the outcomes of Article III adjudication, but also because Presidents nominate judges with a view to bending adjudication toward their preferred policy outcomes. This Article argues that there is a partial solution readily authorized in the Constitution for those disenchanted with the appointments status quo: opt out of presidential nomination and senatorial advice and consent, and vest the appointments power in the Courts of Law. This arrangement, what this Article terms the Judicial Vesting Option, is permissible because the judges of the inferior courts constitute “inferior officers” within the meaning of the Appointments and Excepting Clauses. This solution might be desirable because it would place the appointments process beyond the reach of the President, Senate, or interest groups to influence; and would realistically provide an opportunity for judges to emphasize merit as the principal consideration in appointment. Such an approach to inferior court appointments may be desirable because, as reaffirmed by the successful Roberts and Alito confirmations and the failed Miers nomination, service on the inferior courts has become a political sine qua non for appointment to the Court.*

## I. INTRODUCTION

In the days running up to Samuel Alito’s confirmation vote, Senators John Kerry and Edward Kennedy attempted to mount a filibuster of the proposed successor to Sandra Day O’Connor’s seat on the Supreme Court. The attempt to block an up-or-down confirmation vote was largely symbolic. Republicans controlled the Senate, albeit by a slim margin, and enough Democrats had agreed to end debate. But the threatened filibuster was a warning shot across the Republican bow: the fight for the next vacancy will not go nearly as smoothly.

There is good reason to believe the Democrats are right. A President’s party almost always loses Senate seats during midterm elections.<sup>1</sup> Thus, the

---

\* Associate Professor, William S. Boyd School of Law, University of Nevada, Las Vegas. I thank Jay Bybee, Michael Gerhardt, Bob Lawless, Sylvia Lazos, Andy Leipold, Thomas Miles, Jean Sternlight, and Carl Tobias for reviewing prior incarnations of this Article; Andrew Martin for his assistance with the statistical package “R”; and Kelly Dove, Bryce Loveland, Bret Meich, Michael Murphy, Danielle Oakley, Lindsey Samahon, and Chris Stein for their editorial and research assistance. Any errors that remain are mine alone.

2006 midterm election probably will result in a Senate with a still slimmer margin of Republican control. What's more, the stakes will be higher and fewer Democrats will be willing to break ranks on a vote to end debate. After all, *Roe v. Wade*, the epicenter of the Culture Wars, may be just one vote away from history's dustbin.<sup>2</sup> And that fifth vote may not be very far away. Likely, the next retirements will be aging pro-*Roe* votes. John Paul Stevens and Ruth Bader Ginsburg, at 85 and 73, respectively, are the Court's oldest members. Although the justices can attempt to forestall their retirements, aging and vacancies are inevitable.<sup>3</sup>

Moreover, combat over judicial appointments has not remained confined to the theater of the Court itself. Because the Court's successful nominees are now recruited universally from the U.S. Courts of Appeals, nominations to that proving ground will remain hotly contested. The Senate's close division, the modern trend of divided government, and the prospect of transformative appointments all but assure there will continue to be spectacular conflicts over judicial nominations in the future.

Traditionally, the appointment of federal judges proceeds in three formal phases. The President nominates; the Senate advises and consents (or declines to); and then the President may appoint. What criteria the President and Senate should use in the exercise of their nominating, advising, consenting, and appointing functions is subject to dispute. There are roughly two competing approaches to the President's and Senate's discharge of their appointment functions. At one end of the selection spectrum, the merit camp would have the President and Senate consider character, fitness, and professional competence, and not attempt to secure particular outcomes in Article III adjudication. In short, judicial ideology is not germane.

At the far end of the selection spectrum, in what this Article refers to as ideological selection, the President and the Senate may seek to bend adjudication toward their favored outcomes by focusing principally on a prospective appointee's likely substantive votes on particular legal disputes, considering the nominee's race and religion where necessary as predictors.

---

<sup>1</sup> As a regular phenomenon, the Senate's midterm election loss has existed only since the Seventeenth Amendment provided for direct election of senators. Prior to the 1918 election, the President's party gained Senate seats as often as it lost them.

<sup>2</sup> 410 U.S. 113 (1973). Alito, Scalia, and Thomas are likely votes to overrule *Roe*. Roberts may be a fourth vote. See Memorandum from John Roberts to Att'y Gen. William French, Erwin Griswold Correspondence (Dec. 11, 1981) (casting doubt, in passing, on the "so-called 'right to privacy'" (on file with author).

<sup>3</sup> Their health and personal circumstances permitting, Stevens and Ginsburg are unlikely to choose to retire during Bush's tenure, preferring to hold out for a more ideologically compatible administration. See, e.g., LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT, THE POLITICS OF JUDICIAL APPOINTMENTS 38-40 (2005) (noting politically timed retirements by justices).

Merit may remain important, but “correct” views on desired outcomes are indispensable.

This Article advances the case for a merit-based approach to federal judicial selection that avoids undue emphasis on securing particular outcomes on specific issues. In Part II, this Article canvasses the Roberts, Miers, and Alito nominations. These nominations continued developing themes in ideological selection, such as the norm of prior federal appellate experience and the use of religion and representative nominations in selection. Part III examines the constitutional difficulties invited by ideological selection. In particular, it argues that the tools of such an approach may offend the Appointments Clause, the separation of powers, and the Religious Test Clause. In Part IV, this Article considers the further possibility that the modern judicial selection process, with its emphasis on particular legal outcomes, may yield mediocre justices, or at least fewer great ones. In addition, it argues that judicial diversity, independence, and candor may be threatened by the process’s inordinate emphasis on results-oriented selection.

Finally, in Part V, this Article argues that although the Appointments Clause adopts presidential nomination with Senate advice and consent as the default rule for confirmation,<sup>4</sup> it provides an opt-out for “inferior officers.” Congress may vest their appointments in the federal judiciary.<sup>5</sup> To establish this claim, Part V advances the position that the judges of the U.S. Courts of Appeals and U.S. District Courts are “inferior officers” whose appointments Congress could opt out of the existing process. This non-nuclear, constitutional option—what this Article terms the “Judicial Vesting Option”—would provide some relief to the nominees and the selection process. It would remove the politically accountable President and Senate from the appointments process. Instead, life-tenured and salary-protected Article III judges would appoint the lower court judges. This institutional arrangement, well insulated from external politics, would promote the ideal of merit as the principal criterion for selection. Beyond its permissibility, this

---

<sup>4</sup> Only “officers of the United States” require advice and consent. It is unnecessary for mere “employees.” *United States v. Germaine*, 99 U.S. 508, 509, 511–12 (1879) (distinguishing between an “employé” or agent and the “officers of the United States”).

<sup>5</sup> This argument was previously advanced over 75 years ago. *See generally* Burke Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 485, 492 (1930) (arguing that the appointment of lower Article III judges could be vested in the judiciary). This Article updates the argument to account for the Court’s modern Appointments Clause and separation of powers jurisprudence as well as the developments making such an approach desirable; *see also* Larry W. Yackle, *Choosing Judges the Democratic Way*, 69 B.U. L. REV. 273, 282, 322–24 (1989) (discussing generally the possibility of vesting the appointment of inferior court judges under the Excepting Clause).

Article briefly considers some of the potential advantages and risks of such an approach. Although the Judicial Vesting Option cannot opt the Supreme Court appointments process out of presidential nomination and senatorial advice and consent, it can mitigate some of ideological selection's collateral consequences for the inferior courts.

## II. WHAT WE LEARNED FROM THE ROBERTS, MIERS, AND ALITO NOMINATIONS

After eleven years of no vacancies, within a seven-month period the Court experienced two vacancies, three nominations (one withdrawn), and two confirmations. What did these appointments and the attendant political melee teach us about the modern Supreme Court confirmation process? In this Part, the Article discusses the Roberts, Miers, and Alito nominations and how the successful Roberts and Alito confirmations and the failed Miers nomination have reinforced modern trends in judicial selection.

### A. *John Glover Roberts, Jr.*

On July 1, 2005, Associate Justice Sandra Day O'Connor opened the first vacancy on the Court in almost eleven years with the announcement of her resignation "effective upon the nomination and confirmation of [her] successor."<sup>6</sup> Although a retirement from the Court was widely anticipated,<sup>7</sup> the timing of O'Connor's announcement was somewhat unexpected because it was assumed that the ailing Chief Justice William Rehnquist, battling thyroid cancer, would retire first. In addition to being a surprise, the announcement was momentous. O'Connor, a key swing voter, had cast deciding votes on, *inter alia*, affirmative action,<sup>8</sup> church-state relations,<sup>9</sup>

---

<sup>6</sup> Letter from Justice Sandra Day O'Connor to President Bush (July 1, 2005), available at <http://www.supremecourtus.gov/publicinfo/press/oconnor070105.pdf>. O'Connor limited Bush's tactical options by retiring contingently on the confirmation of her successor. This contingent retirement meant that until the Senate confirmed Bush's selection there was no vacancy to which Bush might appoint a justice. Therefore, Bush could not use his appointment power to fill the vacancy during a Senate recess, a tactic used by prior administrations to help secure a recess nominee's permanent confirmation on the theory that it is more politically difficult for the Senate to oppose the confirmation of a justice already sitting on the Court.

<sup>7</sup> Since the 1940s, most Court retirements occur during the months between terms (June-October).

<sup>8</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (O'Connor, J., upholding the University of Michigan Law School's affirmative action program); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (joining majority in striking down University of Michigan's undergraduate affirmative action program).

federalism,<sup>10</sup> and the fate of a contested presidential election.<sup>11</sup> Four weeks after the announcement, President George W. Bush nominated John Glover Roberts, Jr. to replace O'Connor as an Associate Justice.

While that nomination was pending, however, Chief Justice Rehnquist died.<sup>12</sup> His death created an immediate vacancy in the institutionally significant office of Chief Justice. It also added another dimension of opportunity and risk to the appointments process: simultaneous vacancies are advantageous for a President if he can appoint whom he wants, but twin vacancies also permit the opposition to bundle them and more easily enforce demands for horse-swapping (e.g. "the President can have his 'conservative' on the condition we get our 'liberal'"). In response, the Bush administration withdrew the Roberts nomination to O'Connor's seat and re-nominated him to be Chief Justice,<sup>13</sup> without choosing a nominee to the second vacancy. This tactic shrewdly avoided bundling simultaneous nominations to the Court by handling them seriatim. Moreover, the choice of Roberts to replace Rehnquist was symbolically powerful because Roberts, who had clerked for Rehnquist and participated in his mentor's funeral,<sup>14</sup> was a well-regarded conservative and former Justice Department official, as Rehnquist had been. Thus, the nomination of Roberts to succeed his mentor Rehnquist even had a politically poetic symmetry favoring it, a conservative legal Elisha succeeding a conservative legal Elijah.

In Roberts, Bush found a nominee whose successful appointment reinforced modern trends in the professional qualifications of nominees to the Court. First, Roberts was a highly qualified nominee, a "lawyer's lawyer." He was an honors Harvard Law School graduate, former appellate and Supreme Court clerk, and appellate litigator and partner at Hogan and Hartson, an establishment D.C. law firm. He received an American Bar Association (ABA) highest rating of "very well qualified." In short, he bore the respected credentials of the legal establishment.

---

<sup>9</sup> See, e.g., *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722 (2005) (joining majority).

<sup>10</sup> *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>11</sup> *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam, with O'Connor voting in the majority).

<sup>12</sup> The Chief Justice died during the Senate's summer intra-session recess on September 3, 2005. Bush did not use his recess appointments power to appoint Roberts to Rehnquist's vacant seat.

<sup>13</sup> Press Release, President Nominates Judge Roberts to be Supreme Court Chief Justice, Office of the Press Secretary (Sept. 5, 2005), available at <http://www.whitehouse.gov/news/releases/2005/09/20050905.html>.

<sup>14</sup> John G. Roberts, *In Memoriam: William H. Rehnquist*, 119 HARV. L. REV. 1 (2005).

Second, as have several other Republican nominees, Roberts had substantial executive branch service. During the Reagan administration, he served as a special assistant to the Attorney General and as associate counsel in the White House Counsel's Office. During the Bush I and Clinton administrations, he was the principal Deputy Solicitor General. This experience is comparable to Rehnquist's, Scalia's, and Thomas's executive branch service.<sup>15</sup>

Third, Roberts previously served as a federal appeals court judge. His replacement of Chief Justice Rehnquist not only raised the number of Justices with prior federal appellate judging experience to eight (Rehnquist had never previously been a judge), but also raised to four the number of Justices on the Court with prior service on the U.S. Court of Appeals for the D.C. Circuit.<sup>16</sup>

Fourth, Bush followed a well-worn pattern of bringing an outsider to the Court to serve as chief justice. The elevation of an associate justice to chief justice is rare because it involves two serial Senate confirmations rather than one: (1) the elevation of an associate justice to chief justice; and (2) the confirmation to the vacated associate justiceship. Moreover, the success of the second confirmation depends on the first. If the associate justice to be elevated to chief justice is defeated, there will be no vacant associate's seat to fill. This was the case in 1968 with Abe Fortas's failed nomination to be Chief Justice and the stillborn nomination of Homer Thornberry to replace him as an associate justice. By contrast, nominating an outsider directly to a vacancy in the chief justiceship involves a single confirmation and presents less political risk of failure than the elevation of an insider to chief justice.

Finally, Bush arguably reinforced the recent Republican pattern of choosing a "stealth nominee," a prospective jurist with a de minimis paper trail. On the one hand, Roberts had authored forty-three opinions during his service on the D.C. Circuit,<sup>17</sup> including his vote in the majority in the important test of executive power in *Hamdan v. Rumsfeld*.<sup>18</sup> In addition, Senate Democrats had unearthed a considerable number of executive branch

---

<sup>15</sup> Both Rehnquist and Scalia served as Assistant Attorney General, the Office of Legal Counsel in the Department of Justice. Thomas served as Assistant Secretary for Civil Rights in the Department of Education and as Chairman of the Equal Employment Opportunity Commission.

<sup>16</sup> Ginsburg, Roberts, Scalia, and Thomas all served on the D.C. Circuit.

<sup>17</sup> See generally *Hedgepeth v. Washington Metro. Area Transit Auth.*, 386 F.3d 1148 (D.C. Cir. 2004) (finding no § 1983 liability attaching for the arrest of a teenager caught eating a french fry in a metro station); *Rancho Viejo, L.L.C. v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing en banc in a Commerce Clause challenge to environmental regulation).

<sup>18</sup> 415 F.3d 33 (D.C. Cir. 2005), *rev'd by Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (Roberts, C.J., recused).

documents from the Reagan Library, National Archives, and elsewhere that portrayed a younger Roberts as an originalist, sharp-tongued, Reagan firebrand.<sup>19</sup> These latter documents provided a substantial, albeit dated, paper trail. Thus Roberts, in this respect, was no David Souter. Nonetheless, his nomination gave some social conservatives pause.<sup>20</sup> He had mooted counsel in landmark gay rights litigation while in private practice<sup>21</sup> and had distanced himself from the Federalist Society, the preeminent conservative and libertarian lawyer's group, by disavowing membership.<sup>22</sup>

In one respect, Bush may have surrendered a political objective pursued by other Republican Presidents. He nominated neither a minority nor a woman to fill the vacancy. It had been speculated that Bush might attempt to court the Latino vote by appointing a Mexican-American or other Latino jurist.<sup>23</sup> That is not to say his nomination of Roberts did not attain other political objectives or was not otherwise symbolically representative. By nominating Roberts, a practicing Catholic, Bush reinforced Republican efforts to make inroads with traditional Catholic voters. Moreover, it is possible that Bush relied on Roberts' faith as a proxy for how he might vote on social issues.<sup>24</sup>

Eventually, Roberts was confirmed by a comfortable margin of 78–22, even though the breakdown of votes against him was partisan.<sup>25</sup> Why did the

---

<sup>19</sup> See, e.g., Memorandum from John G. Roberts to Fred F. Fielding, Levitas Proposal Concerning Legislative Veto (Aug. 4, 1983) ("[Congressman] Levitas [D-GA] proposes a 'Conference on Power Sharing' to determine 'the manner of power-sharing and accountability within the federal government' in the wake of the *Chadha* decision. . . . There already has, of course, been a 'Conference on Power Sharing' to determine 'the manner of power-sharing and accountability within the federal government.' It took place in Philadelphia's Constitution Hall in 1787, and someone should tell Levitas about it and the 'report' it issued."); see also Brief for the Respondent at 13, *Rust v. Sullivan*, 500 U.S. 173 (1991) (Nos. 89-1391, 89-1392) (joining in a brief for the Bush administration that "[w]e continue to believe that *Roe* was wrongly decided and should be overruled") (John G. Roberts, Jr., Deputy Solicitor General on the brief).

<sup>20</sup> See, e.g., Ann Coulter, *Souter in Roberts' Clothing*, July 20, 2005 (characterizing Roberts as a "[t]abula rasa" and "[s]tealth nominee" likely to disappoint conservatives).

<sup>21</sup> The landmark case was *Romer v. Evans*, 517 U.S. 620 (1996). See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 148-49 (2005) [hereinafter *Roberts Confirmation Hearing*].

<sup>22</sup> Charles Lane, *Roberts Listed in Federalist Society '97-98 Directory*, WASH. POST, July 25, 2005, at A1.

<sup>23</sup> Neil A. Lewis, *Expecting a Vacancy, Bush Aides Weigh Supreme Court Contenders*, N.Y. TIMES, Dec. 27, 2002, at A1.

<sup>24</sup> See discussion *infra* Part III.C.

<sup>25</sup> 151 CONG. REC. S10, 649–50 (daily ed. Sept. 29, 2005). Only Democrats voted against his confirmation; no Republican joined them. *Id.* This confirmation margin was

Roberts nomination not meet with stiffer resistance? Several political environmental factors likely were at work. To begin, Bush nominated Roberts early in his second term at a time when there was no divided control of government. Republicans controlled the White House and the Senate, even if not a filibuster-proof majority of sixty senators. Further, the Roberts nomination would likely not affect the status quo on the Court. For opponents, Roberts for Rehnquist was at worst a conservative-for-conservative trade. Furthermore, the Democrats may have given Roberts "a pass" and kept their proverbial powder dry because his confirmation hearings occurred in the shadow of a second vacancy to which no nominee had been named. By not naming a second nominee until Roberts was confirmed, the Bush administration denied Democrats the ability to assess whether and to what extent the Court's status quo would be affected.

Opponents of the nomination did question Roberts' professional ethics<sup>26</sup> and did mischaracterize his argument as an advocate for the government in *Bray v. Alexandria Women's Health Clinic*.<sup>27</sup> In addition, the *New York Times*, which strongly opposed Bush judicial nominees on its editorial pages, explored unsealing the Roberts adoption records, even in the absence of any suggested irregularity.<sup>28</sup> These tactics, however, failed to stop the appointment.

Roberts may have been harder to oppose because he was a D.C. legal establishment insider. Roberts enjoyed the respect, if not the support, of

---

much narrower than Antonin Scalia's 98-0 confirmation vote. 132 CONG. REC. S12, 842 (daily ed. Sept. 17, 1986). Of the five Democratic Senators known to be seeking the Democratic nomination for President in 2008, four voted "no" (Bayh, Biden, Clinton, and Kerry). 151 CONG. REC. S10 at 649. Only one voted "yes" (Feingold). *Id.*

<sup>26</sup> Stephen Gillers, David J. Luban & Steven Lubet, *Improper Advances: Talking Dream Jobs With the Judge Out of Court*, SLATE, Aug. 17, 2005, <http://www.slate.com/id/2124603/> (suggesting the selection interviews of John Roberts with the White House during the deliberation of *Hamdan* created an appearance of impropriety). *But see* Letter from Ronald D. Rotunda, Professor, George Mason University School of Law, to Senator Arlen Specter (Aug. 22, 2005) (questioning that analysis), *available at* <http://www.committeeforjustice.org/contents/roberts/rotundaletter1.pdf>.

<sup>27</sup> 506 U.S. 263 (1993). The advertisement depicted a bombed abortion clinic and then accused Roberts of having defended a convicted clinic bomber. In fact, Roberts had filed an amicus brief in *Bray* concerning only the legal issue of blockades of clinics. Roberts had stated that the clinic protesters' conduct was tortious and violated state law, but that the protest did not violate an 1871 federal civil rights act. *See infra* note 30.

<sup>28</sup> Press Release, National Council for Adoption, National Council for Adoption to *New York Times*, "Adoption Records Are Off Limits" (Aug. 5, 2005) (on file with author) ("denounc[ing], in the strongest possible terms, the shocking decision of the *New York Times* to investigate the adoption records of Justice John Roberts' two young children").



prominent Democrats, including D.C. attorneys, former administration officials, legal academics,<sup>29</sup> and the *Washington Post*'s editorial page.<sup>30</sup> The inability to mount effective media opposition may have also been made more difficult given new political realities in the era of the Internet. The ABA no longer enjoyed its privileged pre-nomination position,<sup>31</sup> making leaks to opposition groups less likely and thereby denying nomination opponents the "campaign" advantage of being first mover.<sup>32</sup> In addition, third parties, including groups organized on the Internet, coordinated advocacy on behalf of Roberts.<sup>33</sup> Lastly, the charismatic Roberts defused the opposition by becoming the anti-Bork. While not quite George Clooney, Roberts appeared well groomed, handsome, and telegenic.<sup>34</sup> He repeated the theme of judicial humility and avoided the appearance of imperiousness.<sup>35</sup> He also declined to

---

<sup>29</sup> Both Lloyd N. Cutler, former Counsel to President Clinton, and Seth Waxman, former Solicitor General to President Clinton, had endorsed the nomination of Roberts to the D.C. Circuit. Letter from 100 members of the D.C. Bar to Senators Daschle, Hatch, Leahy, and Lott (Dec. 18, 2002), *available at* <http://www.committeeforjustice.org/contents/roberts/robertsletter.pdf>. Georgetown law professor Richard Lazarus had endorsed the D.C. Circuit nomination. *Id.*

<sup>30</sup> See, e.g., Editorial, *Abortion Smear*, WASH. POST, Aug. 12, 2005, at A18 (editorializing that NARAL Pro-Choice America's ads falsely suggested that John Roberts condoned or justified violence against abortion clinics in his role as Deputy Solicitor General in *Bray v. Alexandria Women's Health Clinic*).

<sup>31</sup> In 2001, the Bush administration dropped the ABA from the pre-nomination vetting of nominees. Letter from Alberto Gonzalez, Counsel to the President, White House, to Martha W. Barnett, President, Am. Bar. Assoc. (Mar. 22, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/03/20010322-5.html>.

<sup>32</sup> During the era of pre-nomination ABA vetting, Republican Presidents had accused the ABA of leaking the names of nominees or derogatory information about them to the media. See, e.g., HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 15 (1999) (describing Nixon's accusations concerning the leaks of the names of Mildred Lillie and Herschel Friday to the media).

<sup>33</sup> See, e.g., The Committee for Justice, <http://www.committeeforjustice.org/contents/roberts/> (last visited Oct. 11, 2006).

<sup>34</sup> However irrelevant a consideration, it has been suggested that Bork's presentation, including his wispy beard, did not help win public support for his confirmation. HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 358 (3d ed. 1992).

<sup>35</sup> Compare *Roberts Confirmation Hearing*, *supra* note 21, at 55 (emphasizing the theme of personal humility, judicial humility, "awe" for the law) with *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Committee on the Judiciary*, 100th Cong. 120-21 (1987) [hereinafter *Bork Confirmation Hearing*].

answer many of the Judiciary Committee's tough questions, citing the precedent of prior sitting justices.<sup>36</sup>

### B. *Harriet Ellan Miers*

Once Roberts was safely confirmed and appointed, Bush nominated Harriet Miers, his White House Counsel and former private attorney, to the O'Connor vacancy. Her nomination, troubled from the start, was withdrawn three weeks after it was made.<sup>37</sup> In part, the Miers nomination may have failed because it violated now-entrenched norms for nominees to the Court, or at least provided opponents with pretextual grounds on which to oppose her. First, unlike Roberts, Miers lacked any prior judicial experience. In an earlier era, it would not have been unusual and perhaps even valued to appoint a non-judge.<sup>38</sup> In the modern era of confirmations, however, that deficit would have made Miers the sole justice on the Court without prior federal appellate experience.

Second, Miers' educational and professional pedigree, while impressive, did not make her a typical choice for the Court. Educationally, the Justices are a remarkably non-diverse, but high achieving, lot. With O'Connor's retirement, the remaining Justices attended just three law schools: Harvard (6), Yale (2), and Northwestern (1).<sup>39</sup> Several were full-time academics at elite law schools (Breyer, Ginsburg, Scalia). In contrast, Miers attended Southern Methodist University, a law school with a strong, but principally regional, reputation.

Yet, Miers had significant professional experience most justices could not claim. She became a successful business lawyer and leader in a large Texas-based law firm in an era when comparatively few women did. She

---

<sup>36</sup> Compare *Bork Confirmation Hearing*, *supra* note 35, at 184–85 (“If *Griswold v. Connecticut* established or adopted a privacy right on reasoning which was utterly inadequate, and failed to define that right so we know what it applies to, *Roe v. Wade* contains almost no legal reasoning . . . . That’s what I object to about the case. It does not have legal reasoning in it that roots the right to an abortion in constitutional materials.”) with *Roberts Confirmation Hearing*, *supra* note 21, at 143 (“I do feel compelled to point out that I should not, based on the precedent of prior nominees, agree or disagree with particular decisions. . . .”).

<sup>37</sup> Statement Announcing the Withdrawal of the Nomination of Harriet E. Miers to be an Associate Justice of the United States Supreme Court, 41 WKLY COMPILATION PRES. DOC. 1608 (Oct. 31, 2005) (claiming Miers withdrew her nomination because Senators demanded “access to internal documents concerning advice provided during her tenure at the White House—disclosures that would undermine a President’s ability to receive candid counsel.”).

<sup>38</sup> See *infra* note 153.

<sup>39</sup> Ginsburg completed her education at Columbia, but commenced it at Harvard.

broke glass ceilings by leading the local and state bar associations. She served in local and state government, including a term on the Dallas City Council and as chair of the Texas Lottery Commission. In addition, her nomination was consistent with the Republican norm of prior executive branch experience. Miers had served as Assistant to the President and Staff Secretary, Deputy Chief of Staff for Policy, and eventually White House Counsel. But for political opponents, her academic paper qualifications and want of prior judicial service would serve as a basis for opposition.

More significantly, other events fostered doubt about Miers' preparation for the Court. Her response to the Senate Judiciary Committee's questionnaire suggested she misunderstood the "one man, one vote" doctrine, or at least misstated it so as to suggest that it required proportional representation;<sup>40</sup> her correction of a conversation that she had with Senator Arlen Specter indicated that she might not have understood the Court's privacy rights jurisprudence or at least did not want her private support of *Griswold* broadcasted;<sup>41</sup> she reportedly flunked her "murder board" sessions intended to prepare her for the Senate Judiciary Committee's hearings;<sup>42</sup> and she auspiciously withdrew her nomination before her ABA evaluation, imminently due, was completed.<sup>43</sup>

In other ways, the Miers nomination was consistent with past practice. Her nomination was symbolic. Bush's prior characterization of Miers as "a pit bull in size 6 shoes," a Texan acknowledgment that she is a woman, was widely repeated.<sup>44</sup> Bush also emphasized Miers' leadership as the first female president of the Dallas Bar Association and the Texas State Bar. Assuming Bush wanted to appoint a Republican or otherwise jurisprudentially compatible and non-controversial woman, this choice to

---

<sup>40</sup> Harriet Miers, Responses to United States Senate Committee on the Judiciary Questionnaire, ¶17, at 49 ("[W]hen addressing a lawsuit under Section 2 of the Voting Rights Act, the council had to be sure to comply with the proportional representation requirement of the Equal Protection Clause.").

<sup>41</sup> Charles Babington, *Analysis: After the Home Run, A White House Balk? Handling of Miers Nomination Cannot Stand Up to Ease of Roberts Approval*, WASH. POST, Oct. 21, 2005, at A4 (reporting that Miers had told Sen. Arlen Specter (R-PA) that she embraced *Griswold v. Connecticut*, but then called him to say that he had misunderstood her).

<sup>42</sup> Peter Baker & Amy Goldstein, *Nomination Was Plagued by Missteps from the Start*, WASH. POST, Oct. 28, 2005, at A1.

<sup>43</sup> The ABA had previously represented it could complete a nominee's evaluation in 20 to 30 days. Letter from Alberto R. Gonzalez, Counsel to the President, White House, to Senators Leahy and Schumer (Mar. 22, 2001), available at <http://www.whitehouse.gov/news/releases/2001/03/20010322-4.html>.

<sup>44</sup> Jay Root, *Notes Reveal Miers' Admiration for Bush*, SEATTLE TIMES, Oct. 11, 2005, at A5.

make a symbolic appointment may have limited his pool of eligible candidates.

The Miers nomination was also consistent with prior Republican efforts to find a paperless cipher as a stealth nominee. Several precipitating political considerations may have influenced the decision to nominate Miers. At the time of her nomination, the Bush administration was in political turmoil. Her nomination followed on the heels of the disastrous response to Hurricane Katrina and the devastation of New Orleans; the criminal investigation of the outing of CIA operative Valerie Plame and the indictment of Scooter Libby, with Karl Rove remaining under investigation; and continued American casualties in the Iraq war. A politically bruised White House sought a nominee who would not require a fight. Miers, who as White House General Counsel was the President's principal advisor on nominations to the Court, appeared to fit the bill. She was reportedly considered for the nomination without her knowledge.<sup>45</sup> Politically, her nomination appeared well calculated to avoid a Senate showdown over her confirmation. Harry Reid (D-NV), the Senate Democratic Minority Leader, had recommended her. Miers lacked a paper trail. She had no judicial opinions, few legally substantive articles, and no disclosed memoranda from any prior executive branch service. Her private practice of law as a commercial litigator kept her from generating a controversial record that Senate Democrats could oppose.

But the Miers stealth strategy backfired for this very reason. What little conservatives did know about Miers antagonized them. Her positions could not be firmly pinned down on abortion<sup>46</sup> and gay rights<sup>47</sup>—what ordinarily would be a virtue in a stealth nominee. She favored affirmative action for minorities and women.<sup>48</sup> She named “Warren” as one of two justices who she held in the highest regard.<sup>49</sup> She donated to Al Gore's presidential

---

<sup>45</sup> Baker & Goldstein, *supra* note 42.

<sup>46</sup> See Babington, *supra* note 41.

<sup>47</sup> Lesbian/Gay Political Coalition of Dallas City Council and Mayoral Questionnaire, 1989 City Council Election (Mar. 28, 1989) (on file with author) (answering “yes” to a question whether “gay men and lesbians should have the same civil rights as non-gay men and women”).

<sup>48</sup> Jo Becker & Sylvia Moreno, *Miers Backed Race, Sex Set-Asides*, WASH. POST, Oct. 22, 2005, at A1.

<sup>49</sup> Michael A. Fletcher & Shailagh Murray, *Warren? Or Burger? A Matter of Judgment*, WASH. POST, Oct. 12, 2005, at A4. Apparently, Miers had intended to name conservative Chief Justice Warren Burger by his first name, and not the liberal icon Earl Warren. *Id.* Although the correction may have saved her from a pickle with Bush's conservative base, her selection of Burger was also problematic. Burger does not enjoy a great reputation as either an administrator or a jurist, especially among conservatives disappointed by his majority vote in *Roe v. Wade*. See Babington, *supra* note 41.

campaign in 1988.<sup>50</sup> She eschewed the Federalist Society.<sup>51</sup> The conservative wing of the Republican party feared Miers might be, for them, another disappointing appointment in the mold of liberal justices appointed by Republican Presidents: Earl Warren (Eisenhower), William Brennan (Eisenhower), Harry Blackmun (Nixon), John Paul Stevens (Ford), and David Souter (Bush). To this list, social conservatives might add Sandra Day O'Connor (Reagan) and Anthony Kennedy (Reagan). Thus, ironically, Bush's choice of a stealth nominee became a liability. As a result, the Bush administration was increasingly forced to reference explicitly Miers' faith in order to reassure Bush's conservative base.<sup>52</sup> Of course, these repeated assurances undermined any advantage Bush may have gained in choosing a stealth nominee, as they prompted liberals to oppose her.<sup>53</sup>

Conservative groups demanded the Miers nomination be withdrawn and a known conservative be named as a replacement. The O'Connor vacancy did not come during a period of divided government, such as during the Bork and Thomas nominations when Democrats controlled the Senate. Thus, for conservative activists, there seemed to be little need for stealth. Rather than resign themselves to the nomination, they bolted from the administration's fold. Typically, such disputes occur prior to the public announcement of nomination, as factions within an administration angle for advantage.<sup>54</sup> In the case of Miers, the administration failed to gain pre-announcement consensus. That failure led to a public post-nomination splintering of the right, bringing

---

<sup>50</sup> Michael Grunwald, Jo Becker & Amy Goldstein, *Harriet Miers: A Deep Dedication to the President, and to Her Work*, WASH. POST, Oct. 4, 2005, at A1.

<sup>51</sup> Transcript of Record at V-46-V-47, *Williams v. City of Dallas*, 734 F. Supp. 1317 (N.D. Tex. 1989) (testifying she "tried to avoid memberships in organizations that were politically charged," like the Federalist Society).

<sup>52</sup> Peter Baker & Charles Babington, *Role of Religion Emerges as Issue*, WASH. POST, Oct. 13, 2005, at A8. Some evidence had already hinted without need for further assurance that Miers might be a social conservative. For example, as a past-president of the State Bar of Texas, Miers had unsuccessfully urged the ABA to maintain neutrality on abortion: 118 ABA ANN. REP. 10 (Aug. 1993); 118 ABA ANN. REP. 19, 892-93 (Feb. 1993). Similarly, she had sought the endorsement of a pro-life group while seeking election to the Dallas City Council, see *Texans United for Life Candidate Questionnaire*, Dallas City Elections 1989, n.d., circa April 1989, but had declined to be endorsed by a gay rights group and had stated her opposition to the repeal of an anti-sodomy statute. See *Lesbian/Gay Political Coalition of Dallas City Council and Mayoral Questionnaire*, 1989 City Council Election, Mar. 28, 1989. Moreover, her membership in a predominantly pro-life church suggested she was personally opposed to abortion. Baker & Goldstein, *supra* note 42.

<sup>53</sup> Baker & Babington, *supra* note 52, at A8.

<sup>54</sup> See, e.g., DAVID ALISTAIR YALOF, *PURSUIT OF JUSTICES* 150, 181-82 (1999) (noting that presidential advisors jockey for the President's ear on nominations to the Court).

into view the usually behind-the-scenes anteroom debates. The Bush administration attempted to quell this dissent by holding conference calls with conservative religious leaders.<sup>55</sup> But the availability of cheap alternative media outlets such as blogs could not stop the Right's spreading disquiet.<sup>56</sup> Conservatives used the blogosphere to defeat Miers in the same way that they used it to organize agile opposition to John Kerry in the 2004 presidential election. In the end, Miers lacked the support of many Republican Senators and a growing number of Democrats. She withdrew her nomination.

*C. Samuel A. Alito, Jr.*

With Roberts confirmed and Miers withdrawn, the Bush administration moved to secure its political base by naming a new nominee around whom its conservative base would rally. On November 10, 2005, Bush nominated Samuel Alito to replace O'Connor. The Alito nomination was a return to several modern themes in judicial selection, while rejecting or qualifying others.

First, like Roberts but unlike Miers, Alito had prior judicial experience. He served as a George H.W. Bush appointee on the U.S. Court of Appeals for the Third Circuit for fifteen years. His replacement of O'Connor would mean that every justice had served previously as a federal appeals court judge. This development further tightened the requirement of judicial experience: prior federal, not state, judicial service became the universal norm for appointment to the Court. In addition, each justice was elevated by a President of the same political party, if not the same President, who had appointed him or her to the court of appeals.<sup>57</sup> As this Article addresses, these norms, by narrowing the pool of nominees to the Court, will affect judicial selection in the future.<sup>58</sup>

Second, Alito's educational and professional attainments placed him within the narrow norms common among the Justices. He attended Yale Law School and clerked for a federal appeals court judge. Increasingly typical of Republican nominees, he had very substantial executive branch service, never having served in private practice. In the Reagan Justice Department, he served as an Assistant to the U.S. Solicitor General and as a Deputy Assistant Attorney General in the Office of Legal Counsel. Under George H.W. Bush, he was U.S. Attorney for the District of New Jersey. The ABA's Standing

---

<sup>55</sup> See Baker & Babington, *supra* note 52.

<sup>56</sup> See, e.g., Confirmthem.com Home Page, <http://confirmthem.com> (last visited Oct. 11, 2006).

<sup>57</sup> See *infra* note 164 and accompanying text.

<sup>58</sup> See discussion *infra* Part IV.B.

Committee on Federal Judiciary recognized this norm-abiding career and rated Alito unanimously "well qualified," with one abstention.<sup>59</sup>

On the other hand, the Alito nomination was a qualification or rejection of certain themes in appointments to the Court. As with Roberts, Alito's nomination was neither a representative nor a symbolic one, at least along the dimension of gender or race. Alito is a white male within the typical age range, 50 to mid-50s, for nominees to the Court. Laura Bush, among others, had publicly expressed her support for a woman to replace O'Connor, but the administration's failed attempt to appoint Miers may have let it off the hook, as it could claim to have discharged its political obligation to appoint a woman.<sup>60</sup>

Bush's choice to forego a symbolic nomination was not without risk, as it left the nominee without political cover from allegations of racism and sexism. Groups opposed to Alito proved this point by challenging his membership in the conservative Concerned Alumni of Princeton (CAP). Alito had listed CAP in his 1985 job application to be a Deputy Assistant Attorney General in the Office of Legal Counsel in the Reagan administration.<sup>61</sup> The group's alumni magazine, *Prospect*, had opposed the admission of women to Princeton and affirmative action for minorities.<sup>62</sup> Senators opposed to Alito equated those positions with sexism and racism and then imputed the positions to Alito personally.<sup>63</sup> In reply to the tactic, Alito distanced himself from CAP. He responded that neither racism nor sexism motivated him to join CAP; instead, he attributed his decision to Princeton's opposition to having an on-campus Reserve Officer Training Corp (ROTC) building.<sup>64</sup> At Senator Kennedy's request, the Senate Judiciary Committee subpoenaed CAP records in former *National Review* editor

---

<sup>59</sup> Letter from Stephen L. Tober, Chair, ABA Committee on Federal Judiciary, to Senator Arlen Specter (Jan. 9, 2006), available at <http://www.abanet.org/scfedjud/Alito-letter.pdf>. The sole abstaining voter was an attorney in a matter pending before a Third Circuit panel in which Judge Alito was participating. *Id.*

<sup>60</sup> The Miers nomination is somewhat reminiscent of Nixon's consideration of Mildred Lillie for the Court. *See infra* note 167.

<sup>61</sup> Personal Qualifications Statement for Samuel A. Alito, n.d., circa. 1985 [hereinafter Alito Statement] available at <http://www.thesmokinggun.com/archive/1114052alito1.html>.

<sup>62</sup> *See* H.W. Crocker III, *In Defense of Elitism*, PROSPECT, Nov. 1983, at 6.

<sup>63</sup> *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States*, 109th Cong. 370, 495–96 (2006) [hereinafter *Alito Confirmation Hearing*] (questioning Alito on whether he had read an article from a 1983 *Prospect* entitled *In Defense of Elitism* that criticized, among other things, affirmative action).

<sup>64</sup> *Id.* at 647.

William Rusher's papers at the Library of Congress.<sup>65</sup> Apparently, he sought evidence of a closer association between Alito and CAP, but no such documentation was found.<sup>66</sup>

Still, as with Roberts, the nomination may have been symbolic or representative along a religious dimension. Like Roberts, Alito is Catholic, and as with Roberts, his appointment could win support among Catholic voters for Republicans. Alito's appointment brought to four the number of Republican Catholic justices appointed to the present Court.<sup>67</sup> This pattern raises the possibility that Presidents have used religion as a rough proxy for votes on issues important to their political bases.<sup>68</sup>

Alito's nomination, following the rejection of Miers, was also a rejection of the strategy of stealth nominees in the absence of divided government, at least when the margin of Senate control is adequate. Alito was a member of the Federalist Society, and had authored extensive executive branch documents that had been disclosed, including a job application touting his conservative bona fides.<sup>69</sup> That application plainly stated his view "that the Constitution does not protect a right to an abortion."<sup>70</sup> In the Solicitor General's office, he advocated to overrule or limit *Roe v. Wade*.<sup>71</sup> In addition, he had a fifteen-year judicial paper trail. He was on the record concerning abortion rights, having dissented in part, at the circuit level, in *Planned Parenthood of Pennsylvania v. Casey*.<sup>72</sup> At his confirmation hearing, he dodged answering questions about the stare decisis weight to be accorded *Roe v. Wade* and *Casey*, and avoided characterizing them as

---

<sup>65</sup> *Id.* at 498–99, 512, 522–23, 577.

<sup>66</sup> The Senate Judiciary Democrats' tactics subsequently backfired. Senator Lindsey Graham (R-SC) offered Alito's wife, present in the committee room, a rhetorical 'apology' for his Democratic colleagues' suggestions that her husband might be a bigot. *Id.* at 548. The apology caused her to cry during the live televised broadcast of the hearing, *id.*, and may have aroused public sympathy for the nominee and his family.

<sup>67</sup> The Catholic Justices are Alito, Kennedy, Roberts, and Scalia. Thomas may also be considered a Catholic, but he was not a practicing Catholic at the time of his appointment. In contrast, both of President Bill Clinton's nominees, Ginsburg and Breyer, were Jewish.

<sup>68</sup> See discussion *infra* Part III.C.

<sup>69</sup> Alito Statement, *supra* note 61.

<sup>70</sup> *Id.* at 8.

<sup>71</sup> Memorandum from Samuel A. Alito to the Solicitor General re: *Thornburgh v. American College of Obstetricians and Gynecologists* (May 30, 1985) (characterizing the case as an "opportunity to advance the goals of bringing about the eventual overruling of *Roe v. Wade* and, in the meantime, of mitigating its effects") (on file with author).

<sup>72</sup> *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682, 719 (3d Cir. 1991) (Alito, J., concurring in part, dissenting in part) (dissenting from decision striking down spousal and parental notification statute).



immune from being overruled as “super precedent” or as “super duper precedent.”<sup>73</sup> His positions were well known, documented, and proven. In short, Alito was the anti-Miers.

Predictably, then, Alito’s nomination resulted in an eleventh-hour threat of filibuster and a close—but ultimately successful—vote. Senators Kennedy and Kerry organized the effort to filibuster, i.e., to block an on-the-merits vote on the nomination by way of the exercise of the senatorial privilege of extended debate.<sup>74</sup> Ironically, the filibuster was defeated because the bipartisan “Gang of 14” Senators, seven Democrats and seven Republicans, had joined forces months earlier to disallow the filibuster of judicial nominees, except in the case of “extraordinary circumstances.”<sup>75</sup> The cloture motion to wind down debate passed 72-25-3,<sup>76</sup> averting a political crisis where Senate Republicans might have invoked the so-called “constitutional” or “nuclear” option, the plan of a GOP majority to circumvent the supermajority requirement of sixty votes to invoke cloture and (eventually) end a filibuster.<sup>77</sup> The cloture successful, the confirmation vote was predictable in a Republican controlled Senate. Alito won confirmation by a

---

<sup>73</sup> See *Alito Confirmation Hearing*, *supra* note 63, at 318–19, 321, 531.

<sup>74</sup> David D. Kirkpatrick, *Kerry Urges Alito Filibuster, But His Reception Is Cool*, N.Y. TIMES, Jan. 27, 2006, at A14.

<sup>75</sup> Memorandum of Understanding on Judicial Nominations (May 2005), available at <http://www.c-span.org/pdf/senatecompromise.pdf> [hereinafter Memorandum of Understanding].

<sup>76</sup> No Republican opposed the cloture motion. All 25 voting against were Democrats, joined by Jim Jeffords (I-VT). 152 CONG. REC. S308 (daily ed. Jan. 30, 2006).

<sup>77</sup> Defenders of the plan prefer to call it the “constitutional option” to counter doubts about its permissibility. See generally Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster*, 28 HARV. J.L. & PUB. POL’Y 205 (2004) (making the case for the “constitutional option”). Senator Trent Lott coined the competing phrase “nuclear option,” a self-inflicted rhetorical wound that benefited his opponents in their assertion that abolition of a supermajority entrenched filibuster would amount to a constitutionally suspect power grab. Lott was so wedded to his “nuclear option” rhetoric that he used the term to refer to different strategies at different points in time. Initially, the “nuclear option” referred to the GOP minority’s plan to employ parliamentary procedure to grind to a halt all Senate work to protest the alleged mistreatment of Bush judicial nominees. See, e.g., *National Briefing Bush: Here Comes Da Judges; Mideast Stays on Top of Admin*, AMERICAN POLITICAL NETWORK: THE HOTLINE, May 6, 2002, at 5. At that time, the Senate Republicans were the minority during a brief nineteen-month period when Democrats controlled the Senate, following Jim Jeffords’s split with the GOP. Eventually, the “nuclear option” came to refer to the parliamentary procedural strategy to overcome a filibustering minority and obtain an up-or-down vote. See, e.g., Michael Crowley, *On the Hill: Private Opinion*, NEW REPUBLIC, Apr. 7, 2003, at 17 (describing Lott’s later usage of “nuclear option”).

vote of 58-42.<sup>78</sup> Although not filibuster-proof, the margin satisfied the Senate's tradition of majority rule.

### III. CONSTITUTIONAL OBJECTIONS TO AN IDEOLOGICAL SELECTION PROCESS

Defenders of ideological selection begin with the obligatory observation that the Appointments Clause is "silent regarding the criteria Senators are to use in evaluating nominees' fitness for the Court . . . ."<sup>79</sup> The Clause provides that "[the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court . . . ."<sup>80</sup> It does not define the terms "Advice and Consent," nor specify the substantive criteria on which Senate "consent" may depend. For that matter, it does not specify the criteria that a President shall use in nominating. This ambiguous design may have been intentional to allow consensus among the Framers over a disputed procedure.<sup>81</sup>

Moreover, the Clause's language and structure suggest the lack of criteria was purposeful for another reason. Although the very same "Advice and Consent" language applies both to the Senate's function in confirming executive as well as judicial nominees,<sup>82</sup> executive officials and federal judges have different job descriptions and tenures. Considerations of competence, professional distinction, and character and fitness are doubtless desirable in any type of nomination. The additional qualities of probity, nonpartisanship, and impartiality are arguably indispensable for the exercise

---

<sup>78</sup> 152 CONG. REC. S348 (daily ed. Jan. 31, 2006). Seventeen Senators apparently took the position that Alito should receive an up-or-down vote, even though they were personally opposed to Alito. All five of the Senators thought to be seeking the Democratic presidential nomination voted against cloture (Bayh, Biden, Clinton, Feingold, and Kerry). *Id.* Lincoln Chafee (R-RI) was the sole Republican to vote "no" to confirmation. *Id.* On those votes scored by the Americans for Democratic Action, Chafee's "liberal quotient" score for 2004 (55%) indicates he was slightly more likely to vote with Democrats than with his fellow Republicans. *ADA 2004 Congressional Voting Record*, ADA TODAY (Americans for Democratic Action, Washington, D.C.), Apr. 2005, at 16.

<sup>79</sup> See, e.g., MICHAEL COMISKEY, *SEEKING JUSTICES: THE JUDGING OF SUPREME COURT NOMINEES* 20 (2004).

<sup>80</sup> U.S. CONST. art. II, § 2.

<sup>81</sup> The Appointments Clause's ambiguity may have been a purposeful, political expediency to obtain consensus on a provision hotly disputed by large states, which favored presidential power, and small states, which favored senatorial prerogative. JOHN ANTHONY MALTESE, *THE SELLING OF SUPREME COURT NOMINEES* 21-22 (1995).

<sup>82</sup> Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J.L. & PUB. POL'Y 467, 477 (1998).

of the judicial power. Similarly, a senator will use greater discretion when weighing whether to confirm a judge to life tenure. Senators will be relatively more deferential in giving their advice and consent to executive branch nominees because they serve for short terms and are politically accountable. That the phrase "Advice and Consent" refers to different types of review suggests the terms were open-ended for a purpose. Thus, it is correct to say that the phrase "Advice and Consent" itself does not foreclose the consideration of ideology or politics in opposing a judicial nominee.

### *A. Supermajority Rules and the Appointments Clause*

"Advice and Consent" might permit an ideological selection process. Its tools, however, might run afoul of other constitutional requirements. Senators may use the senatorial privilege of limitless debate to thwart simple majority action on a matter before the Senate. Senate rules governing filibusters require three-fifths of the senators to vote to end debate—i.e. at present, a 60-vote supermajority—before a simple majority vote can occur. This requirement of a cloture vote has permitted Senate minorities to thwart simple majority rule since the late 1830's.<sup>83</sup>

The potential constitutional difficulty arises with the mere majority requirement to confirm a judge and the supermajority vote required to close a filibuster. Historically, the Senate has interpreted the Appointments Clause to require a simple majority vote to confirm judicial nominees as a procedural matter.<sup>84</sup> This reading results from the contrasting reference to a two-thirds vote of the Senate being required to ratify a treaty in the Treaty Clause, which appears in the sentence immediately preceding the Appointments Clause.<sup>85</sup> A minority filibuster of judicial nominees runs afoul of the Clause because it requires a supermajority to end debate before a simple majority

---

<sup>83</sup> Gold & Gupta, *supra* note 77, at 215. Further, "neither the concept nor the practice of filibustering to prevent majority rule existed in the early U.S. Senate." *Id.* at 214.

<sup>84</sup> Senator Robert Byrd (W-VA) suggested the absence from the Appointments Clause of any requirement that the Senate "vote" on a nominee means that the Senate does not need to provide any confirmation vote at all on a judicial nominee. *Hannity & Colmes: Sen. Robert Byrd Talks with Alan Colmes* (FOX television broadcast Mar. 11, 2005) (on file with author) (statement of Sen. Robert C. Byrd). That conclusion is not the only one that could be drawn from the absence of any mention of a "vote." The absence of any requirement to hold a vote could equally imply that Senators may give their advice and consent by any number of means, including by way of a personal letter to the President expressing consent to a judicial nominee. Editorial, *The Byrd Option-II*, WALL ST. J., Mar. 30, 2005, at A16. Such a strategy would have the effect of circumventing a filibuster to an up-or-down vote on a nominee's confirmation.

<sup>85</sup> U.S. CONST. art. II, § 2.

vote can occur to confirm a nominee.<sup>86</sup> This requirement effectively raises the number of Senate votes presently required to confirm a nominee from fifty-one to sixty, thereby imposing a greater burden than that required by the Constitution.

Article I, Section 5 does authorize the Senate to make rules governing its proceedings ("Each House may determine the Rules of its Proceedings . . .") and some commentators have interpreted this grant of power to trump any claim that a rule enacted pursuant to this authority—such as the cloture rule that dictates a three-fifths supermajority vote to end debate—is unconstitutional.<sup>87</sup> Nevertheless, no rule promulgated pursuant to the Rules of Proceedings Clause may conflict with another provision of the Constitution or else the Rules of Proceedings Clause would defeat the Framers' carefully enumerated safeguards by permitting the rest of the Constitution to be swallowed by the exercise of power under the Clause. Each house of the legislature has the power to determine the rules of its proceedings, including voting rules, but it may not exercise that power in violation of other sections of the Constitution.<sup>88</sup> Thus, the Senate could not promulgate a rule requiring all nominees before the Senate Judiciary Committee to take a denominational religious oath in violation of the Religious Test Clause as a procedural preliminary to receiving a hearing. Similarly, the Rules of Proceedings Clause cannot tread on the Appointments Clause by requiring a supermajority if the Appointments Clause requires only a simple majority.

Admittedly, the Appointments Clause does not expressly require a simple majority—it is simply silent, in contrast to the special mention of a two-thirds vote in the Treaty Clause. But other constitutional provisions suggest a simple majority rule was implied throughout the Constitution, except where the document explicitly provided otherwise. The Vice President Voting Clause is evidence of this majority rule.<sup>89</sup> First, the Clause anticipates that in the Senate, where there is an even number of members, there may be tie votes. The Vice President's ability to break "*equally divided*" votes, i.e. 13-to-13 votes in 1789 or 50-to-50 votes in 2006,

---

<sup>86</sup> *But cf.* John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 486–87 (1995) (arguing that the Constitution's silence on whether a majority is required to pass legislation does not imply default majority rules, but represents a purposeful delegation of voting rules to congressional discretion).

<sup>87</sup> *Id.* at 485 (defending as constitutional supermajority rules promulgated pursuant to the Rules of Proceedings Clause).

<sup>88</sup> *United States v. Ballin*, 144 U.S. 1, 5 (1892) ("[E]ach house . . . may not by its rules ignore constitutional restraints or violate fundamental rights . . .").

<sup>89</sup> U.S. CONST. art. I, § 3.

indicates the Framers' intent that simple majority rules would govern, except where the Constitution specifically designated supermajority voting.<sup>90</sup> Second, the Senate's adoption of supermajority rules ousts the Vice President from his role of tiebreaker in equally divided cases. This ouster may amount to a congressional encroachment on the executive branch's power to vote by diluting the Vice President's opportunities to break tie votes and would result in the Senate's aggrandizement in tied votes at the expense of the executive branch.<sup>91</sup>

In addition, the cloture rule (and its three-fifths requirements for closing filibusters) may permit a Senate minority to entrench the supermajority rule by allowing proposed changes to the cloture rule *itself* to be filibustered.<sup>92</sup> This tactic effectively would permit one Senate to bind all future Senates without requiring any constitutional amendment.<sup>93</sup> As Senator Robert Byrd put it, the "dead hand" of a past Senate cannot restrain a future one.<sup>94</sup> Past, present, and future Senates are co-equal, each with its own electoral and constitutional mandate, and therefore, the cloture rule of a prior Senate cannot be permitted to bind a future one. If a prior Senate majority could

---

<sup>90</sup> Critics of this reading assert that the ability to break "equally divided votes" "simply reflects the Framers' reasonable assumption that the [Senate and House] would often choose to use majority rule and that majority rule would be the default rule applied when no other procedure was adopted." McGinnis & Rappaport, *supra* note 86, at 488. This interpretation does not give adequate weight to other constitutional provisions that suggest majority voting is not merely a default option, but the fixed constitutional rule, unless the Constitution specifically departs from it. For example, the Quorum Clause explicitly provides that "a Majority of each [house] shall constitute a Quorum to do Business." U.S. CONST. art. I, § 5. (emphasis added). The rule that a simple majority constitutes a quorum becomes all but meaningless if the principal business of a legislative body, legislating, may not be done without a supermajority present.

<sup>91</sup> Admittedly, the Vice President casts his vote in his capacity as President of the Senate, a legislative, not executive branch officer. His tie-vote power is suggestively located in Article I, not Article II. It remains that the Vice President, even if formally President of the Senate, is an executive officer, elected jointly with the President pursuant to the Twelfth Amendment, defending the interests of the executive branch.

<sup>92</sup> See, e.g., John O. McGinnis & Michael B. Rappaport, *Supermajority Rules and the Judicial Confirmation Process*, 26 CARDOZO L. REV. 543, 545 n.5 (2005) (noting concern that rules insulated from repeal by requiring supermajorities would permit one Senate to bind another Senate); John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385, 407–08 (2003) (same).

<sup>93</sup> See Constitutionality of Proposed Budget Process Reform Legislation, 11 Op. Off. Legal Counsel 44, 45 (1987) (stating that "Congress cannot by legislation prevent itself from enacting future legislation pursuant to whatever procedures it chooses to follow at a future time. A future Congress can always legislatively change what a previous Congress has done.").

<sup>94</sup> 125 CONG. REC. 144 (1979) (statement of Sen. Robert C. Byrd).

bind a future Senate majority, it has effectively amended the Constitution without undertaking the Article V amendment process.

To this point, a constitutional crisis over judicial nominees to the Court itself has been forestalled. The bipartisan "Gang of 14" Senators, seven Democrats and seven Republicans, averted the use of the "nuclear option" to resolve judicial filibusters.<sup>95</sup> Traditionally, two means existed to overcome the filibuster. First, the Senate majority could patiently wait out the filibustering senator(s) until they collapsed from exhaustion or could otherwise continue no further.<sup>96</sup> Second, the Senate could seek a vote on a motion to wind down debate, or cloture. The number of votes required to invoke cloture has varied over the Senate's history, but since 1975 cloture has required a supermajority of 60 votes.<sup>97</sup> The nuclear option has reemerged as a potential third means to overcome a minority's blocking use of the filibuster, particularly a minority's use of the filibuster to block the consideration of any change to the filibuster rule itself.<sup>98</sup> The deal permitted the cloture of debate on three filibustered circuit court nominees, who were all subsequently confirmed, and generally disallowed the filibuster of judicial nominees, except in "extraordinary circumstances."<sup>99</sup> In turn, the seven Republican Senators agreed not to cooperate with any attempt to invoke the nuclear option to amend the Senate's rules on debate.<sup>100</sup> During the attempted Alito filibuster, the deal held together. All fourteen Senators agreed his appointment would not constitute an "extraordinary circumstance," and Alito received an up-or-down vote.

This outcome was little more than political grace. What constitutes an "extraordinary circumstance" is a highly contestable proposition. If one of the fourteen decided to invoke the escape clause and filibuster, it would be easy to imagine another Senator declaring "breach." Assuming all other Republicans agreed to invoke the nuclear option, it would require only two of

---

<sup>95</sup> *Memorandum of Understanding*, *supra* note 75.

<sup>96</sup> See, e.g., 103 CONG. REC. 16263-78 (1957) (reporting Sen. Strom Thurmond's record filibuster of the Civil Rights Act of 1957, in which filibuster ended due to the Senator's health).

<sup>97</sup> MARK SILVERSTEIN, JUDICIOUS CHOICES: THE NEW POLITICS OF SUPREME COURT CONFIRMATIONS 21 n.14 (1994).

<sup>98</sup> A prior flirtation with this option occurred in 1975. Gold & Gupta, *supra* note 77, at 208-09.

<sup>99</sup> The nominees were Priscilla Owen, William Pryor, and Janice Brown. *Memorandum of Understanding*, *supra* note 75, at 1.

<sup>100</sup> *Id.* The agreement made no provision for on-the-merits votes in the cases of nominees William Myers and Henry Saad. *Id.* at 1. Saad has since asked that his name be withdrawn from consideration. *Nominee for Appeals Court Withdraws*, WASH. POST, Mar. 24, 2006, at A4.

the Gang of 14 Senators in a Senate controlled by Republicans to be successful. In addition, the deal's validity lasts only as long as the dealmakers' tenure.

Thus, one of the Senate's principal tools for advancing ideological selection is unconstitutional. It denies a simple majority of the Senate their vote to confirm a nominee. Moreover, as is discussed later in this Article, senators have used the filibuster tool selectively to target nominees on the basis of sex, race, and ideology.<sup>101</sup>

### B. *Separation of Powers*

Justices, sensitive to the professional responsibility not to prejudge a case, or at least sensitive to the political consequences of doing so, have avoided giving senators specific answers to questions about controversies that might come before the Court.<sup>102</sup> That avoidance, however, also has a constitutional dimension.

Article III provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."<sup>103</sup> This power to decide cases or controversies, within the enumerated jurisdiction of Article III, is the prerogative of neither the legislative nor the executive branches. Neither Congress nor the President may override the Court's constitutional holdings, unless resort is made to the Article V amendment process. To insulate this adjudication from ordinary political pressures, Article III cloaks judges with tenure during good behavior and salary protection against congressional tampering.

Yet, the President and the Senate may exercise leverage over how judges exercise the judicial power in the future in particular cases. A President may submit his nominees to a litmus test, nominating only judges who will rule to attain particular desired outcomes in particular cases or legal issues. Failure to meet the President's test may result in a prospective candidate not being nominated. Similarly, the Senate, as a body or as individuals, may attempt to exact commitments on how a prospective justice will vote in particular cases. Nominees testify to the Senate Judiciary Committee under oath. If prospective justices are made to commit their votes on particular cases or

---

<sup>101</sup> See discussion *infra* Part IV.B.

<sup>102</sup> See, e.g., *Roberts Confirmation Hearing*, *supra* note 21, at 147 ("Well, I think that [question] gets to the application of the principles in a particular case," noting that "based on my review of the prior transcripts of every nominee sitting on the Court today, that's where they've generally declined to answer, when it gets to the application of legal principles to particular cases.").

<sup>103</sup> U.S. CONST. art. III, § 1.

particular issues, they impair their later ability to exercise judicial power. Failure to comply with a senator's wishes may result in the withholding of that senator's consent. This use of nomination and advice and consent to secure outcomes in advance may encroach on the judiciary's ability to decide cases, as opposed to simply rule on them.<sup>104</sup> Judges may feel no obligation to keep promises to a nominating President or confirming Senate. But to the extent a judge promises particular outcomes and feels obliged to honor these commitments, such a selection process may amount to an aggrandizement of the political branches at the expense of the judiciary's independence.<sup>105</sup>

Proponents of ideological selection appeal to the concept of "constitutional democracy" to defend outcomes by appointment, even if it effectively requires constitutional amendment by way of adjudication.<sup>106</sup> Given Article V's high barrier to amendment, Congress arguably lacks any effective check on the judiciary. That fact, together with the judiciary's claim of hermeneutic supremacy in constitutional adjudication, supports an ideological, democratic selection process.<sup>107</sup> Thus, the argument goes, an ideological selection process that results in judicial reinterpretation of the Constitution is superior to the procedurally formal, textually ordained Article V amendment process.<sup>108</sup>

Two arguments in favor of this position are worth addressing. First, it is contended that if frequent constitutional amendments to reverse the Court were possible, they would target unpopular minorities and thus amendment by adjudication is preferable.<sup>109</sup> This argument relies on contradictory premises. Constitutional amendments are infrequent because the Article V process, by design, is onerous. For that reason, defenders of ideological selection conclude that "the people" need a more effective means of checking the judiciary, namely, ideological review of nominees who will, under interpretation's cover, amend the Constitution.<sup>110</sup> Such a review is good, it is claimed, because if frequent reversals of the Court were possible, the

---

<sup>104</sup> "[T]he Federal Judiciary [has] the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy . . ." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19 (1995) (citing Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1990)).

<sup>105</sup> *Buckley v. Valeo*, 424 U.S. 1, 129 (1976) (stating that "the debates of the Constitutional Convention, and the Federalist Papers are replete with expressions of fear that the legislative branch of the National Government will aggrandize itself at the expense of the other two branches").

<sup>106</sup> COMISKEY, *supra* note 79, at 33.

<sup>107</sup> *Id.* at 26–35.

<sup>108</sup> *Id.* at 31.

<sup>109</sup> *Id.*

<sup>110</sup> *See id.*



amendments would target unpopular minorities.<sup>111</sup> But the public cannot frequently amend the Constitution—that was the objection originally. Either (1) constitutional amendments are easily obtained, effective democratic checks on the judiciary that potentially threaten minorities, or (2) they are difficultly obtained, ineffective checks that thereby do not pose a threat to minorities. They cannot be both.

Second, frequent constitutional amendments, assuming they were possible, it is asserted, would undermine the public's allegiance to the Constitution's "specialness."<sup>112</sup> This argument too is self-defeating. Ideological selection is defended as an alternative to constitutional amendment as a check on the judiciary, presumably because ideologically selected judges would occasionally "amend" the Constitution by way of their opinions. Assuming, *arguendo*, the public would feel the Constitution is less "special" if frequently amended, would it feel any differently if it were the federal judiciary rather than the people who did the frequent amending? If the frequency of amendment has an inverse relationship to the public's allegiance to the Constitution, consider that it is much easier to forge a five-vote majority than the arduous, double supermajority concurrences required by Article V.

In addition to securing outcomes by appointment, the Senate has used its advice and consent power to *stall* an appointment in order to influence the resolution of particular cases pending in collegial courts. One high-stakes illustration from a federal appeals court is worth mention. On November 14, 2003, the *Wall Street Journal* published an editorial including several excerpts from leaked Senate Democratic staffers' memoranda.<sup>113</sup> Among these, a memorandum to Senator Kennedy revealed that Elaine Jones, President and Director-Counsel of the NAACP Legal Defense and Education Fund, lobbied the Senator's staff to delay the confirmation of Julia Smith Gibbons to the Sixth Circuit.<sup>114</sup> The NAACP had sought the delay to affect the outcome in the University of Michigan affirmative action cases.

In *Grutter v. Bollinger*, a district judge enjoined the law school's affirmative action plan as a violation of the Equal Protection Clause and Title VI of the 1964 Civil Rights Act.<sup>115</sup> In *Gratz v. Bollinger*, another U.S. District judge upheld the 1999-2000 admissions program for Michigan's College of Literature, Science, and the Arts, but found that the 1995-1998

---

<sup>111</sup> *Id.*

<sup>112</sup> COMISKEY, *supra* note 79, at 31.

<sup>113</sup> Editorial, *He is Latino*, WALL ST. J., Nov. 14, 2003, at A12.

<sup>114</sup> Memorandum re: Call from Elaine Jones re Scheduling on 6th Circuit Nominees (Apr. 17, 2002) (on file with author) [hereinafter *Elaine Jones Memorandum*].

<sup>115</sup> *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 872 (E.D. Mich. 2001), *aff'd*, 539 U.S. 306 (2003).

programs violated the Equal Protection Clause.<sup>116</sup> The Sixth Circuit had granted plaintiffs' request for an initial hearing en banc of the consolidated appeals in *Grutter* and *Gratz*.<sup>117</sup> Given the Circuit's close division between Democratic and Republican appointees, the NAACP feared that Gibbons, if appointed to the Sixth Circuit before the appeals were resolved, might cast a deciding vote against affirmative action.<sup>118</sup> To prevent that possibility, Jones sought Senator Kennedy's intervention to stall the Gibbons confirmation.<sup>119</sup> The memorandum explained that

Elaine would like the Committee to hold off on any 6th Circuit nominees until the University of Michigan case regarding the constitutionality of affirmative action in higher education is decided by the en banc 6th Circuit . . . . The thinking is that the current 6th Circuit will sustain the affirmative action program, but if a new judge with conservative views is confirmed before the case is decided, that new judge will be able, under 6th Circuit rules, to review the case and vote on it.<sup>120</sup>

The staffer then "recommend[ed] that Gibbons be scheduled for a later hearing: the Michigan case is important, and there is little damage that we can foresee in moving [Richard] Clifton [a nominee to the Ninth Circuit] first."<sup>121</sup>

Notwithstanding this recommendation, the Senate Judiciary Committee held its meeting on April 25, 2002 as scheduled,<sup>122</sup> and it unanimously reported Gibbons's nomination to the full Senate on May 2, 2002.<sup>123</sup> An anonymous Senator did promptly lodge a "hold" against Gibbons, even though no groups had opposed her nomination.<sup>124</sup> This hold delayed her confirmation until a cloture vote eventually overcame it in late July 2002.<sup>125</sup>

On May 14, 2002, during the delay resulting from the anonymous hold, the Sixth Circuit decided *Grutter*, 5-4, in favor of the University of Michigan

---

<sup>116</sup> *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 814 (E.D. Mich. 2000), *aff'd in part, rev'd in part*, 539 U.S. 244 (2003).

<sup>117</sup> *Gratz v. Bollinger*, 277 F.3d 803, 803 (6th Cir. 2001).

<sup>118</sup> *Elaine Jones Memorandum*, *supra* note 114.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> 148 CONG. REC. S3453 (daily ed. Apr. 25, 2002).

<sup>123</sup> 148 CONG. REC. S3842 (daily ed. May 2, 2002).

<sup>124</sup> James W. Brosnan, *Gibbons Vote Slated Monday*, COM. APPEAL, July 27, 2002, at B2.

<sup>125</sup> 148 CONG. REC. S7391-92 (daily ed. July 26, 2002).

Law School.<sup>126</sup> Although no decision was immediately forthcoming in the companion *Gratz* case,<sup>127</sup> the purpose for delay had already been achieved: *Grutter* created a split with the Fifth Circuit on the permissibility of race-conscious law school admissions policies.<sup>128</sup> As predicted, the split among circuits led to the Court granting certiorari in *Grutter* and *Gratz*.<sup>129</sup> The Court majority then upheld the core of *Bakke*'s plurality, viz., that narrowly tailored race-conscious admission policies to further a compelling state interest in a (racially) diverse student body are permissible.<sup>130</sup> Once *Grutter* was decided for the defendants, no further delay was required. The Senate confirmed the uncontroversial Gibbons by a vote of 95-0.<sup>131</sup>

The same separation of powers concerns that animated an outcry against the Terry Schiavo private bill<sup>132</sup> and the jurisdiction-stripping provisions of the Detainee Treatment Act<sup>133</sup>—congressional tinkering with pending judicial proceedings—counsel against abuse of the selection process to affect pending cases. Ideological selection will lead to future litigants seeking to affect a pending appeal by way of appointments. In this way, the President and the Senate may aggrandize themselves at the expense of the Third Branch.

### C. The Religious Test Clause

Another concern of constitutional dimensions is that the nominating President or senators who are engaging in ideological selection might consciously consider a nominee's religion. The Religious Test Clause provides that "all . . . judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; *but no religious Test shall ever be required as a Qualification*

---

<sup>126</sup> *Grutter v. Bollinger*, 288 F.3d 732, 752 (6th Cir. 2002).

<sup>127</sup> The *Grutter* opinion announced it was deciding that appeal only and that the consolidated *Gratz* appeal would be decided in a forthcoming opinion. *Id.* at 735 n.2.

<sup>128</sup> See *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996) (holding that a state university's race conscious admission policies violate the Equal Protection Clause and declining to follow *Bakke* as a non-binding plurality decision), *reh'g and reh'g en banc denied*, 84 F.3d 720 (5th Cir. 1996).

<sup>129</sup> *Elaine Jones Memorandum*, *supra* note 114 ("This case is considered the affirmative action case most likely to go to the Supreme Court.").

<sup>130</sup> *Grutter*, 539 U.S. at 343.

<sup>131</sup> 148 CONG. REC. S7454–55 (daily ed. July 29, 2002).

<sup>132</sup> An Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 15 (2005).

<sup>133</sup> Detainee Treatment Act of 2005, Pub. L. No. 109-148, Div. A, Tit. X, 119 Stat. 2739 (2005).

to any Office or public Trust under the United States.”<sup>134</sup> A judge is an officer of the United States. The singling out of judicial nominees for appointment or rejection to judicial office on the basis of their adherence to a particular faith or certain religious beliefs (e.g., whether a nominee, a practicing Catholic, believes that the death penalty or abortion is sinful) could constitute a “religious test.”<sup>135</sup> Although such a Religious Test Clause violation might prove nonjusticiable or otherwise lack any effective private legal remedy,<sup>136</sup> Presidents and senators have duties, independent of any enforceable judgment, to take seriously their oaths to uphold the Constitution, including the Religious Test Clause.

The recent nominations and confirmations reinforced the concern that Presidents and senators engage in such tests as part of an ideological selection process. For example, President Bush and administration officials explicitly cited Miers’ faith as a consideration in her nomination<sup>137</sup> and may have selected Roberts and Alito, in part, due to their faith. Senators Arlen Specter (R-PA) and Dick Durbin (D-IL) queried Roberts about his faith in relation to abortion.<sup>138</sup> Their questions to Roberts may have seemed fair game, i.e., would Roberts dispassionately apply precedent with which he disagreed? But at the same time, neither Specter nor Durbin approaches the law as a purely or even mostly formal enterprise where precedent is mechanically applied. Both are non-formalist, pro-choice Senators posing the question to a Catholic. For non-formalists, precedent does not decide cases by dictating legal conclusions. Instead, such decisions are discretionary judgments. In short, the question posed by pro-choice Senators to a Catholic nominee, “whether he will apply precedent” irrespective of conflicts with his faith, amounts to a coded inquiry into whether the nominee would vote in a Catholic way or whether he would vote in a way that pleases the Senators.

Similarly, one may question the distinct presidential pattern of nominating justices of particular faiths. Both Roberts and Alito are practicing Catholics. Their appointments mean that Republican Presidents have

---

<sup>134</sup> U.S. CONST. art. VI, cl.3 (emphasis added).

<sup>135</sup> For a more elaborate discussion of religious tests, see J. Gregory Sidak, *True God of the Next Justice*, 18 CONST. COMMENT. 9 (2001).

<sup>136</sup> *Id.* at 40.

<sup>137</sup> See Baker & Babington, *supra* note 52, at A8.

<sup>138</sup> *Roberts Confirmation Hearing*, *supra* note 21, at 146 (inquiring whether Roberts adopted John Kennedy’s statement that “I do not speak for my church on public matters, and the church does not speak for me.”); Jonathan Turley, Op-Ed., *The Faith of John Roberts*, L.A. TIMES, July 25, 2005, at B11 (opining Roberts incorrectly answered questions asked by Senator Durbin about Roberts’ faith).

appointed five of the last six Catholic Justices.<sup>139</sup> Perhaps this trend is a coincidence. It could also mean that Republican Presidents have used religious litmus tests, perhaps as proxies for substantive views about areas of the law.<sup>140</sup> This pattern is not unique to Republican Presidents. Democratic Presidents have appointed five of the last six Jewish Justices to the Court (Breyer, Frankfurter, Fortas, Ginsburg, and Goldberg).<sup>141</sup> Conversely, no Democratic President since the 1965 advent of privacy rights in *Griswold v. Connecticut* has appointed a Catholic to the Court.<sup>142</sup>

Religious tests are not constitutionally condemned because they are ineffective. On the contrary, they may be very effective. Absent other reliable indicators, religion might be the best proxy for potential votes on highly contested social issues,<sup>143</sup> where constitutional text frequently provides little guide for adjudication. But the Religious Test Clause also makes religious belief a constitutionally forbidden qualification for office. A selection process that employs religion as a criterion undermines this safeguard.

#### IV. SUBCONSTITUTIONAL OBJECTIONS

Apart from constitutional objections to selection with a view to securing particular legal outcomes, there are other concerns that, while not rising to the level of constitutional violation, might give a conscientious President or

---

<sup>139</sup> The Catholic Justices are: Alito, Kennedy, Roberts, Scalia, and Thomas. At the time of his appointment, Justice Thomas, who had attended the Saint John Vianney Minor Seminary, Conception Seminary College, and Holy Cross, was a lapsed Catholic. See KEN FOSKETT, *JUDGING THOMAS* 73, 88, 91, 92, 285 (2004). He has since rejoined the Catholic Church. *Id.* at 285–86. For a brief history of Catholic jurists on the Court, see generally Barbara A. Perry, *The Life and Death of the "Catholic Seat" on the United States Supreme Court*, 6 J.L. & POL. 55 (1989) (tracing the history of Catholics as representative appointments to the Court).

<sup>140</sup> Alternately, administrations may have selected conservative Catholics to pressure Democratic senators hailing from states with traditionally sizeable Catholic constituencies, such as Massachusetts, New Jersey, or New York, into supporting, or at least not opposing, the judicial nominations.

<sup>141</sup> Benjamin Cardozo, appointed by Hoover in 1932, was the last and only Jewish nominee to be appointed to the Court by a Republican President. In 1987, Reagan nominated D.C. Circuit Judge Douglas Ginsburg to the Court. He withdrew that nomination following revelations of Ginsburg's prior marijuana use.

<sup>142</sup> Justice Frank Murphy, appointed by Franklin Roosevelt, was the last Catholic to be appointed to the Court by a Democrat. He served from 1940 to 1949.

<sup>143</sup> See, e.g., Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743, 764–65 (2005) (reporting differential responsiveness of Catholic and Jewish judges to establishment and free exercise claims by claimants of different faiths).

senator pause. These subconstitutional objections, as with their constitutional counterparts, are not limited to objections about the Senate's abuse of its advice and consent function, but also extend to the possible abuse of the President's nominating power.

### A. *Mediocrity and Stealthiness*

One argument against ideological scrutiny of nominees is that Presidents will nominate mediocre justices whose chief virtues are not legal distinction and intellect, but the absence of any controversial paper trail.<sup>144</sup> This claim is based on the Senate's rejection of Robert Bork, an extensively published law professor and originalist jurist, and the Senate's subsequent approval of David Souter, a jurist with little paper trail. In the legal profession, a paper trail—such as law review articles, treatises, appellate briefs, or judicial opinions—is a mark of distinction. The absence of these may signal an undistinguished career, a disengaged intellect, or an unproductive jurist. Nominating Presidents select nominees with “indistinct views and sufficient competence, but less than exceptional merit.” in order to secure the Senate's confirmation of their nominees.<sup>145</sup> Alternately, it may be that an ideological selection process does not produce mediocre nominees, just fewer jurists of great stature.<sup>146</sup> This phenomenon would be particularly pronounced during divided government, where the President fears the Senate may fail to confirm. Equally, mediocrity may result from a President's preoccupation with finding ideological bedfellows that meet narrow criteria for youth, representation, etc., at the expense of quality.

To challenge the charge of mediocrity, Professor Michael Comiskey has employed expert perception survey data from 128 constitutional law scholars to score the quality of each justice.<sup>147</sup> The Comiskey study compares justices

---

<sup>144</sup> See, e.g., Bruce Fein, *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672, 683 (1989) (arguing that a political confirmation process will result in “an intellectually stagnant and mediocre Supreme Court that is resistant to enlightened evolution of jurisprudence and re-examination of questionable precedents”).

<sup>145</sup> COMISKEY, *supra* note 79, at 84.

<sup>146</sup> SILVERSTEIN, *supra* note 97, at 162, 162 n.1 (“[T]he contemporary confirmation process is not configured to favor nominees to the Court with the stature of a Frankfurter, or a Holmes or the legendary experience of a Brandeis or a Marshall,” unless the nominee has countervailing qualities that could “neutralize expected opposition.”).

<sup>147</sup> COMISKEY, *supra* note 79, at 88. The surveys were distributed to 275 scholars. *Id.* at 87. Survey respondents were asked to evaluate justices as “excellent, good, fair, poor, or failure,” corresponding to numerical values of 4, 3, 2, 1, and 0, respectively, based on “their overall performance as Supreme Court justices, using such criteria as the quality of their legal reasoning, their ‘learnedness’ in the law, their ability to communicate their decisions clearly, and their leadership within the Court.” *Id.* at 88.

appointed prior to 1967 to those appointed since then.<sup>148</sup> It concludes that although none of our present Justices enjoys scores suggesting distinction, our current Justices are above average compared with other twentieth-century justices. The study claims to defeat the “far-reaching claims” of a “Court of mediocrity.”<sup>149</sup> Nonetheless, it concedes that the survey data do not foreclose a more modest claim that an ideological selection process will result in fewer jurisprudential greats than in the past.<sup>150</sup>

Although this methodology makes some sense, the study has several limitations. First, in addition to the politicization of the confirmation process during the latter half of the twentieth century, the process has been evolving in another important dimension. Later twentieth century nominees are not only subject to scrutiny in how they may likely rule on particular legal issues, but they are also subject to extensive professional vetting, including examination by the ABA.<sup>151</sup> This ABA involvement has had the effect of professionalizing the federal judiciary and reducing some of the worst excesses of cronyism that infected earlier administrations’ nominations.<sup>152</sup> This development means that the higher than average scores of current Justices might reflect the fact that an ABA review process may have raised the average standard of nominees by demanding higher professional qualifications than expected in the past. It is possible that this concurrent development masks the full impact of an ideological selection process. It could be that the ABA’s influence has been increasing the quality of nominees while simultaneously an ideological process has been diminishing the quality of nominees.<sup>153</sup> The Comiskey Study’s data and statistical

---

<sup>148</sup> Comiskey chooses 1967, the year Thurgood Marshall was appointed to the Court, as the dividing point in the confirmation firmament because of the heightened contention, as evidenced by more frequent rejection of nominees, and scrutiny, as measured by the length of hearings nominees thereafter faced. *Id.* at 89. This choice excludes several prior confirmations that clearly focused on ideology, such as John Parker’s failed 1930 nomination to the Court.

<sup>149</sup> *Id.* at 103 (citing to Bruce Fein, *A Court of Mediocrity*, 77 A.B.A. J. 74, 74 (Oct. 1991)).

<sup>150</sup> *Id.*

<sup>151</sup> Prior to March 2001, the ABA participated in the pre-nomination process. Since that time, the ABA has participated in the post-nomination process.

<sup>152</sup> Truman was noted for cronyism in his appointments to the Court, see YALOF, *supra* note 54, at 20–40, a practice that may have contributed to their mediocrity. All the Truman appointees scored below the average quality rating (2.46) of twentieth-century justices: Burton (1.81), Vinson (1.69), Clark (2.10), and Minton (1.43). COMISKEY, *supra* note 79, at 91.

<sup>153</sup> Relatedly, the ABA’s role in the modern confirmation process may also be the reason that fewer justices received a score suggesting greatness. The norm of prior appeals court experience means modern justices boast less career diversity. Career

analysis are valuable. Nevertheless, they are not a *ceteris paribus* comparison of quality under ideological selection and merit selection.

Second, the Comiskey Study tests the mediocrity thesis by examining the quality of confirmed justices. This focus on the Court might be misplaced. The nature of a selection process focused principally on a nominee's probable position on particular legal issues could mean that a President will need to find a very well qualified nominee to the Supreme Court to defuse political opposition that relies on makeweight charges that a nominee is unqualified or only minimally so for the highest court in the land. Thus, Roberts and Alito were very well qualified to defuse opposition. Instead, the mediocrity thesis might be better examined in the lower visibility setting of appeals courts. Under an entrenched norm of prior U.S. Courts of Appeals experience,<sup>154</sup> the Court could never rise above the quality of the appellate bench. Rather than lament that the modern Supreme Court confirmation process could never produce a Brandeis, Cardozo, or Frankfurter, one might more appropriately ask whether the modern confirmation process could ever produce an Easterbrook, Lynch, Posner, or Tatel. Were these broadly published jurists nominated to the U.S. Courts of Appeals today, they would find confirmation difficult because of the perceived political liabilities that come with intellectual volubility.<sup>155</sup>

The anecdotal evidence from the Roberts, Miers, and Alito nominations to the Court is consistent with the stealth and mediocrity theses. Roberts, although he lacked an academic paper trail like Bork's, was still a known conservative. Over 5,000 documents he had authored were available,

---

diversity appears to have some impact on the perception of greatness and is apparent when one examines the Comiskey Study's list of great justices and their immediate prior employment. COMISKEY, *supra* note 79, at 91–92. None were previously federal appellate judges. Several lacked any prior judicial experience. Justices Black (U.S. Senator), Brandeis (private practice), Frankfurter (law professor), Harlan (private practice), Hughes (private practice), Jackson (U.S. Attorney General), Stone (U.S. Attorney General), and Warren (state governor) were all lawyers engaged in careers outside the judiciary. Only Brennan, Cardozo, and Holmes had any experience as judges prior to appointment, and their experience was uniquely in a state court. Thus, the absence of great justices in the modern era may not be entirely a product of ideological selection. Instead, it may be the output of a professionalized confirmation process, a “McStandardization” of the federal judiciary.

<sup>154</sup> See discussion *infra* Part IV.B.1.

<sup>155</sup> See, e.g., John R. Lott, Jr., *The Judicial Confirmation Process: The Difficulty With Being Smart*, 2 J. EMPIRICAL LEGAL STUD. 407, 434 (2005) (noting “a 1 percent increase in judicial quality increases the length of the confirmation process by between 1 and 3 percent”). This study may simply reflect the additional time required to review a well-qualified nominee's lengthier record of professional attainment (e.g. more judicial opinions to read), and not a political handicap. The non-confirmation of well-qualified judges would be the strongest evidence that merit handicaps nominees.



including ones that revealed his positions on abortion, originalism, busing, and the separation of powers.<sup>156</sup> Thus, Roberts was not truly a stealth nominee. Significantly, Roberts is no mediocrity.

In contrast, Bush's nomination of Miers could fairly be called a stealth nomination. She had written no briefs on constitutional law, had very little paper trail, and had not taken positions on many of the important issues of the day. Compared to Roberts, her qualifications for the Court were slight. Her rejection as a nominee and the nomination of Alito represented a rejection of stealth nominees, at least under the condition of unified government with an adequate margin to confirm. This does not mean the phenomenon of stealth nominees and the attendant risk of mediocrity are no longer a concern. In the future, should there be either divided government or a slimmer margin of Senate control, one could expect to see the return of stealth nominees.

## *B. The Impact on the Inferior Courts of the United States*

One area of special concern is the impact an ideological selection process has had and will have on the pool of candidates from whom most justices are principally drawn, the ranks of U.S. Courts of Appeals judges. Similarly, an ideological selection process may affect the candor, independence, and impartiality of appeals court adjudication.

### *1. The Impact on the Composition of the Appeals Courts*

Increasingly, Presidents lay their groundwork for future nominations to the Court by appointing potential talent to the U.S. Courts of Appeals. Senators and their client interest groups fight these confirmations preemptively by opposing these appointments. The short-term effect of this opposition will be a less racially and gender-diverse appeals court. The long-term effect will reach beyond the U.S. Courts of Appeals. Prior experience as an appellate judge has become an entrenched norm for service on the Court. Thus, a less diverse appellate court will limit future choices to the Court.

#### *a. "Darlings" of the Selection Process*

The U.S. Courts of Appeals are the Court's bullpen. The appointments of Chief Justice Roberts and Justice Alito, and contrastingly the rejection of Harriet Miers, reinforce a trend on the Court that nominees not only have prior judicial experience, but also federal appellate experience. This

---

<sup>156</sup> See, e.g., Memorandum from John Roberts to Att'y Gen. William French, Erwin Griswold Correspondence, Dec. 11, 1981 (doubting the existence of a "right to privacy").

development reflects a continuing trend of requiring judicial experience generally,<sup>157</sup> and federal appellate experience specifically, as a prerequisite for nomination to the Court.

Presidents have good reason to focus on the appeals courts in their nominations beyond the historical reasons that once justified it.<sup>158</sup> Federal appellate judges have previously survived ABA and FBI scrutiny during a prior confirmation. They have already successfully navigated the Senate, enjoyed the prior support of senators, and developed a judicial record that may reassure a President and senators concerned about the substance of a judge's jurisprudence.<sup>159</sup> In addition, a successful appointment of a federal appellate judge to the Court will permit a President to appoint another judge to the new vacancy created in the lower post. Moreover, a President's nomination of a judge previously confirmed by the Senate permits the political rhetoric that, in view of the Senate's prior confirmation, no good reason now exists to oppose the nominee.<sup>160</sup> As demonstrated by Souter's and Thomas's short stints of service, the touchstone is not extensive prior experience, but successful navigation of the Senate.

Finally, the muzzle of federal judicial service might prevent incautious words that could later sink a nominee. It is with good reason, then, that federal appellate judges have become the "darlings" of the modern appointments process<sup>161</sup> and their courts the feeder bench for future justices.<sup>162</sup>

---

<sup>157</sup> Lee Epstein et al., *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CAL. L. REV. 903, 937-38 (2003) (concluding based on statistical analysis of appointments data that "a requirement of prior judicial experience has become a norm").

<sup>158</sup> YALOF, *supra* note 54, at 44, 223 n.18 (attributing Eisenhower's preference for advancing nominees up the judicial hierarchy as a reflection of his familiarity with the military's hierarchical merit system).

<sup>159</sup> *Id.* at 170-71.

<sup>160</sup> Of course, there is a relevant and important difference between the two. Vertical stare decisis binds hierarchically inferior federal appellate judges to follow the Supreme Court's on-point precedent. The relationship is vertical, or between inferior and superior. Horizontal stare decisis merely constrains justices to follow their own precedent—decisions made by their co-equal predecessors—until a five-vote majority decides to overrule it. Once there are five votes to overrule, it merely becomes a matter of prudence whether the Court will revise what was once established precedent.

<sup>161</sup> YALOF, *supra* note 54, at 170.

<sup>162</sup> Not all commentators are sanguine about this development. Compare Epstein, *supra* note 157, at 908, 941 (expressing concern that fewer women and racial minorities in positions that are "steppingstones to the bench" will result in less diversity on the Supreme Court) with STEPHEN L. CARTER, *THE CONFIRMATION MESS* 161 (1994) ("[T]he seats on the Court should be reserved for those who have spent many years as appellate

Nothing in Article III compels a President to nominate a federal appellate judge, rather than, for example, a state judge or politician, to the Court. But given the momentum of the norm, it is likely that opposition groups, such as with the failed Miers nomination, would seize on a President's nomination of a non-judge to claim that he or she was unqualified. Thus, it seems increasingly unlikely a President would venture far beyond the federal appellate bench to find a justice.<sup>163</sup>

### *b. Narrowing the Field of Choices*

A prior judgeship on the U.S. Courts of Appeals, though, is only a necessary, and not a sufficient, criterion for serious consideration as a nominee to the Court. Several other considerations winnow the field of candidates down to a handful of possibilities. First, with few recent exceptions, appointing Presidents nominate justices who are from their own political parties.<sup>164</sup> This phenomenon may reflect the growing value nominating Presidents place on judges who will vote in substantively desirable ways. Combined with the norm of prior federal appellate experience, this criterion considerably narrows the field of candidates.

Second, Presidents want youthful nominees to the Court. They want to maximize the political capital that will be expended in confirmation fights. Thus, they consider youth when making nominations to the life-tenured Article III judiciary.<sup>165</sup> From Eisenhower to the present, justices were an average age of 53.5, or a median age of 55, at the time of taking their oath.<sup>166</sup> Given increased life expectancy, a youthful justice could anticipate service for over two decades.

Third, as racial minorities and women have gained political clout, Presidents have become increasingly conscious of demands for constituent representation on the Court. Administrations have used such identity politics to further their own ends by appointing justices with "correct" views. For example, symbolic or substantive representation on the Court could be used

---

judges in the federal system or on the highest court of a state with a heavy and diversified work load.").

<sup>163</sup> One possible exception might be a handful of elite, inside-the-beltway Justice Department officials, such as the Attorney General, the Solicitor General, or the Assistant Attorney General for the Office of Legal Counsel.

<sup>164</sup> The most recent exception was Nixon appointee Lewis Powell, a Democrat, in 1972.

<sup>165</sup> Presidents have ventured outside this limit in nominating minorities and women to the Court. Justice Thomas was forty-three when nominated. Justice Ginsburg and Harriet Miers were both sixty at the time of their nominations.

<sup>166</sup> A similar pattern of appointing youthful jurists exists in appointments to the U.S. courts of appeal. SHELDON GOLDMAN, PICKING FEDERAL JUDGES 353 (1997).

to court different political constituencies, such as Latinos, in an effort to win votes for elected officials in other branches of government.<sup>167</sup> Such a strategy could also be used to shape public opinion by demonstrating that race does not necessarily imply allegiance to a particular political party.<sup>168</sup> Moreover, female and minority nominations may permit an administration to defuse opposition to a nominee.<sup>169</sup> But there is a trade-off. The use of race or gender as criteria dramatically limits a President's choice to a small group of candidates on the non-diverse U.S. Courts of Appeals.

Finally, the search for a confirmable, distinguished nominee whose views on substantive legal issues comport with the President will narrow the field to all but a handful of individuals. These nominees may or may not be the best qualified.

What do these criteria imply for a George W. Bush administration looking for a youthful (sixty or younger), female or minority, Republican federal appellate judge to appoint to the Court? The criteria mean the talent pool is small. This fact may have handicapped Bush in his selection of a woman. Excluding those outside the optimal age range,<sup>170</sup> there are only fifteen female GOP appointees who could be potential nominees to the Court: Janice Rogers Brown, Consuelo Callahan, Edith Clement, Deborah Cook, Allyson Duncan, Julia Smith Gibbons, Sandra Segal Ikuta, Edith Jones, Kimberly Ann Moore, Priscilla Owen, Sharon Prost, Reena Raggi, Diane Sykes, Deanell Tacha, and Karen Williams. The pool is even smaller when one considers minority appointments. Under the same constraints of

---

<sup>167</sup> Such a strategy might work because, as some commentators have suggested, representative nominations may enjoy "enhanced legitimacy" with groups traditionally underrepresented on the Court. Kevin R. Johnson & Luis Fuentes-Rohwer, *A Principled Approach to the Quest for Racial Diversity on the Judiciary*, 10 MICH. J. RACE & L. 5, 28-29 (2004). But it may also be that a nomination need not be successful to lend an air of legitimacy or to court a constituency. See, e.g., *Selecting Supreme Court Justices: A Dialogue*, 20 FOCUS ON LAW STUDIES 8-9 (2005) (comment of Mary Dudziak) (noting how Nixon cynically perceived the leak of his intent to nominate a woman to the Court, Mildred Lillie, and her subsequent failure to receive a qualified rating to have served his political purposes, even though she was never nominated or confirmed).

<sup>168</sup> Barbara A. Perry & Henry J. Abraham, *A 'Representative' Supreme Court? The Thomas, Ginsburg, and Breyer Appointments*, 81 JUDICATURE 158, 165 (1998) (noting that minority groups are not politically monolithic); STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 40 (1991) ("But unless one supposes that biology implies ideology, this movement to make race a proxy for views surely involves a category mistake.").

<sup>169</sup> Cf. SILVERSTEIN, *supra* note 97, at 100 ("[T]he modern president is compelled to seek out nominees who present characteristics certain to forestall, or at least minimize, this opposition.").

<sup>170</sup> Alice Batchelder, Susan H. Black, Karen Henderson, Jane Roth, Ilana Rovner, Pamela Rymer, and Pauline Newman were excluded from the pool on this basis.

age and political party, there are only seven minority federal appeals court judges, several of them overlapping with the list of female jurists: Emilio Garza, Edward Prado, Consuelo Callahan (overlap), Jerome Holmes, Lavenski Smith, Allyson Duncan (overlap), and Janice Brown (overlap).<sup>171</sup> The Bush administration would further winnow this pool of candidates on the basis of talent and distinction, jurisprudential or ideological fit, and most importantly, confirmability. O'Connor's retirement, the appointment of two white males, and the growing political clout of Latinos as a swing constituency increase the political pressure for, and the likelihood of, a future representative nomination to the Court.

### *c. How a Political Confirmation Process Affects Minorities and Women*

The norm of prior federal appellate experience combined with the above criteria give political opponents a new tactic in the confirmation wars: block the confirmation of minorities and women of opposing viewpoints to the federal appeals bench to prevent them from ever sitting on the Court.<sup>172</sup> This fight over lower court judges is an extension or "spillover effect of the politicization" of the Court's appointment process.<sup>173</sup>

Why oppose nominees at the U.S. Courts of Appeals level? Several factors favor the strategy as a less politically risky undertaking than opposing the same nominees to the Supreme Court. First, the public's political ignorance assures that most voters will not understand procedural maneuvers to block nominees, such as the filibuster.<sup>174</sup> Second, nominations to the appeals courts are less visible to the public, attracting less press attention

---

<sup>171</sup> Roger Gregory and Parker Barrington were excluded from this list as their appointments were reported to be in exchange for Democrats permitting other GOP nominations to advance in the Senate on a case-by-case basis rather than blocking them en masse. Audrey Hudson, *Democrats Give Up Veto Demand After Bush's 'Gesture'*, WASH. TIMES, May 10, 2001, at A1.

<sup>172</sup> David A. Yalof, *Dress Rehearsal Politics and the Case of Earmarked Judicial Nominees*, 26 CARDOZO L. REV. 691, 699–708 (2005) (describing the "targeting [of] future justices in the lower court confirmation process").

<sup>173</sup> *Selecting Supreme Court Justices*, *supra* note 167, at 4 (comment of Elliot Slotnick). An additional explanation is that the federal appeals courts have assumed greater importance in the federal court system in view of shrinking Supreme Court review. See Carl Tobias, *The Federal Appellate Court Appointments Conundrum*, 2005 UTAH L. REV. 743, 760 (2005).

<sup>174</sup> See Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1305 (2004) (noting the difficulty of "apportioning praise and blame to political incumbents" in light of widespread voter ignorance).

than nominations to the Court.<sup>175</sup> Finally, the norm of prior federal appellate experience creates a bottleneck to the Court that invites opposition groups to block appointments as a first bite at the apple in preventing nominees from ever sitting on the Court itself.

Given the small pool of federal appellate jurists, the filibuster of female and minority nominees to the federal appeals courts is more serious than portrayed. Although only ten nominees were filibustered,<sup>176</sup> all were nominated to the U.S. Courts of Appeals, the hiring pool for the Court. Five of those filibustered, or 50%, were women and/or minorities.<sup>177</sup> Yet, women and minorities comprised only 27.8% of all Bush federal appellate nominees as of March 1, 2006. Although these percentages are striking, inferential statistical analysis does not reveal any statistically significant relationship between the choice to filibuster and the nominee's race or gender.<sup>178</sup>

---

<sup>175</sup> *Selecting Supreme Court Justices*, *supra* note 167, at 17 (comment of Michael Gerhardt) ("Democrats are able to filibuster lower court nominees in part because they are relatively low-profile events."). Senator Kennedy's staffers may have been acknowledging as much in confidential strategy memoranda leaked to the press. *See, e.g.*, Memorandum re: Members Meeting with Leader Daschle (Jan. 30, 2003) (hereinafter Meeting with Daschle Memorandum) ("[Miguel] Estrada is likely to be a Supreme Court nominee, and it will be much harder to defeat him in a Supreme Court setting if he is confirmed easily now [for the D.C. Circuit] . . ." (emphasis added)).

<sup>176</sup> This Article operationally defines "filibuster" of a nominee as whether a motion for cloture received at least fifty-one votes, but unsuccessfully ended debate because it did not receive sixty votes. This definition, which would exclude silent filibusters, is not universally accepted. For example, some commentators have suggested that nominees who were eventually confirmed by a majority vote were filibustered by virtue of the fact that a motion for cloture was made, even if successful, during the debate of the nominations. *See* Catherine Fisk & Erwin Chemerinsky, *In Defense of Filibustering Judicial Nominations*, 26 CARDOZO L. REV. 331, 332 (2005) (describing Rosemary Barkett, Marsha Berzon, Edward Carnes, and Richard Paez, who were successfully confirmed, as having been filibustered).

<sup>177</sup> The ten filibustered nominees were: Carolyn Kuhl (withdrawn), Charles Pickering (withdrawn), William Myers (pending), William Pryor (confirmed), Richard Griffin (confirmed), Miguel Estrada (withdrawn), Priscilla Owen (confirmed), Henry Saad (withdrawn), Janice Rogers Brown (confirmed), and David McKeague (confirmed). The racial or ethnic minorities are: Miguel Estrada (Latino), Henry Saad (Arab-American), and Janice Rogers Brown (African-American).

<sup>178</sup> A Fisher exact probability test was employed to examine whether there was any statistical significance between the independent variable, the nominee's race (or gender), and the dependent variable, the choice to filibuster. Taking all George W. Bush Article III nominees, excluding the courtesy appointment of Clinton recess appointee Roger Gregory and appointee Barrington Parker, there was no statistically significant relationship between the choice to filibuster and the nominee's race ( $p = 0.3842$ ). The gender-bias hypothesis fared no better ( $p = 0.4274$ ).

That does not mean that race is unimportant in the choice of whom to filibuster. It is possible that a nominee's ideology, when taken together with race, determines who is to be filibustered. Anecdotally, at least, the interaction between race, ideology, and the decision to filibuster appear linked. For example, leaked Democratic staffers' memoranda indicate that interest groups actively considered race in strategizing opposition to D.C. Circuit nominee Miguel Estrada. One of the memoranda specifically suggests that Senator Kennedy himself was an impetus behind a race-conscious strategy of opposition, indicating he was "anxious to develop a strategy for the Supreme Court and a strategy for dealing with conservative Latino Circuit Court nominees that are hostile to constitutional and civil rights."<sup>179</sup> Another memorandum explains that groups "identified Miguel Estrada (D.C. Circuit) as especially dangerous, because he has a minimal paper trail, he is Latino, and the White House seems to be grooming him for a Supreme Court appointment."<sup>180</sup> It explicitly connected the strategy for opposing nominations to the Court with the strategy of opposing minority circuit court nominees.<sup>181</sup>

Likely, the political drive for racially or gender representative appointments with "correct" views, and not racial animus or sexism *simpliciter*, determines who becomes a filibuster target. Nonetheless, the targeting of minorities or women would have the effect of reducing an already small pool of minority or female federal appellate jurists. There is no reason to believe that such an approach will be limited, or has been limited, to one political party.<sup>182</sup>

---

Similarly, an analysis of federal appellate nominations only (i.e. excluding district court nominations) reveals that there was no statistically significant relationship between the choice to filibuster and the nominee's race ( $p = 0.2154$ , one-tailed or  $p = 0.3324$ , two-tailed) or gender ( $p = 0.2955$ , one-tailed or  $p = 0.3780$ , two-tailed). The results were computed in R.

<sup>179</sup> Memorandum to Senator Kennedy, Subject: Judges and the Latino Community (Feb. 28, 2002) (on file with author) [hereinafter *Senator Kennedy Memorandum*].

<sup>180</sup> Memorandum to Senator Durbin, Re: Meeting with Civil Rights Leaders Yesterday to Discuss Judges (Nov. 7, 2001).

<sup>181</sup> Senator Kennedy Memorandum, *supra* note 179; see also Meeting with Daschle Memorandum, *supra* note 175.

<sup>182</sup> Such targeting would be available to both political parties. Indeed, during the Clinton administration, Senator Leahy insinuated that Republicans were stalling the nominations of women and minorities. See, e.g., 144 CONG. REC. S5424 (daily ed. May 22, 1998) (statement of Sen. Leahy) ("For some unexplained reason, judicial nominees who are women or racial or ethnic minorities seem to take the longest.").

## 2. *The Impact on the Candor, Independence, and Impartiality of the Courts*

The impact on the courts of appeals will not be limited to who judges. It will extend also to how they judge. Among the Framers' most important first principles is the observation that men are not high-minded angels.<sup>183</sup> Article III tenure certainly does not transfigure judges into such. This fact produces two risks.

First, the threat of ideological selection creates incentives for appeals court judges to judge timorously and author less candid opinions. Although Article III tenures judges during good behavior and secures judicial compensation against reduction, it does not politically insulate appellate judges with ambition for future elevation to the Court.<sup>184</sup> Ideological selection equally implicates two sets of players: the President, who will scrutinize the small pool of prospective nominees for ideological fit, and senators, who also will scrutinize for ideological fit. Madison may be correct that ambition counteracts ambition in one sense: because ambitious prospective nominees to the Court have two audiences to please, both the President and the Senate, perhaps the countervailing political winds cancel one another and the judges will adjudicate independently.

But for an ambitious judge seeking elevation, this process could result in votes that favor a President, but without offering detailed reasons for it. Circuit judges may be well advised to avoid rocking the boat or otherwise generating a paper trail susceptible to political attack. On one hand, this chilling effect may result only in less candid opinions. Prospective nominees to the Court may avoid elaborating a concurrence when a reserved "I concur" might do; they may venally decline a vigorous dissent when a colorless one might suffice. On the other hand, the threat of a political confirmation process could, at the margins, affect the outcome of cases. Judges may decline to strike down federal legislation or declare executive action unconstitutional, fearful of the potential fallout they might face at a future Senate confirmation hearing or that they might forfeit a possible promotion.<sup>185</sup>

---

<sup>183</sup> THE FEDERALIST NO. 51 (probably James Madison).

<sup>184</sup> Tracey E. George, *Judicial Independence and the Ambiguity of Article III Protections*, 64 OHIO ST. L.J. 221, 244-45 (2003) (noting judicial ambition as an endogenous threat to judicial independence and that the confirmation process "include[s] a close consideration of [judges'] judicial record by the Executive, the Senate, and increasing numbers of interest groups").

<sup>185</sup> These concerns would be particularly acute with recess appointed federal judges. Whether recess appointed judges moderate their votes in anticipation of a future Senate confirmation hearing is an open empirical question.



A judge's ambition that he or she might be nominated to the Court is not unreasonable given the criteria-driven selection process used by Presidents and the Senate in targeting nominees for promotion or opposition. As confirmed by the successful Roberts and Alito appointments, no justice is drawn from any other rank than that of active status, appeals court judges of the President's party within a narrow band of age. Moreover, not all circuit courts are created equal. D.C. Circuit judges may have particularly good reasons to believe they are on the fast track to the Court. Its staple of important constitutional and administrative law cases qualifies the D.C. Circuit as the presumptive bullpen for presidential nominations to the Court. It provides a President an opportunity to assess the ideological "fitness" of a nominee on executive power and other structural constitutional issues prior to nomination. In addition, the D.C. Circuit's proximity to the White House and Justice Department likely increases the visibility of its judges to the administration attorneys and staffers who vet and recommend nominees.<sup>186</sup> It may be no coincidence, then, that Roberts' appointment makes him the fourth D.C. Circuit judge on the Court. The prospect of an ideological selection process—where the President, the Senate and interest groups all use ideological litmus tests—may diminish judicial independence and candor in opinion writing.

Second, these fallible beings, once invested with Article III tenure, may judge vindictively those parties who unsuccessfully fought their confirmations. This concern may arise especially where an interest group has attacked a nominee's character and fitness,<sup>187</sup> intentionally misstated a nominee's record,<sup>188</sup> or foraged into a nominee's personal life in an attempt to embarrass or harass.<sup>189</sup> An ideological confirmation process raises serious concerns that vindictive judging would become a more commonplace bitter fruit of such a process. If interest groups, especially groups that litigate in federal court, oppose nominees, these groups should worry about

---

<sup>186</sup> This fact may explain, in part, the phenomenon of "national security fundamentalism" on the D.C. Circuit. Cass R. Sunstein, *National Security, Liberty, and the D.C. Circuit*, 73 GEO. WASH. L. REV. 693 (2005) (noting a sizeable number of pro-executive power decisions from the D.C. Circuit).

<sup>187</sup> See, e.g., Ralph G. Neas, Editorial, *At Least DOJ Spots Ethics Trouble*, LEGAL TIMES, Apr. 11, 2005, at 53 (attacking fitness of D.C. Circuit Judge Tom Griffith on account of lapse in his D.C. bar membership).

<sup>188</sup> See *supra* note 27.

<sup>189</sup> Cf. Michael Dolan, *The Bork Tapes*, WASHINGTON CITY PAPER, Sept. 25, 1987, at 1, 12, 14, 16, 18 (publishing a list of some of the videos rented under Robert Bork's wife's account); see also *supra* note 28 (noting investigation of the adoption of the Roberts children, absent any facial irregularity).

retaliation.<sup>190</sup> Such litigants-cum-political actors, especially those who appear in federal court with some regularity, are well advised to recall the old adage: If you shoot at the king, you had better not miss.<sup>191</sup>

## V. THE ALTERNATIVE OF THE JUDICIAL VESTING OPTION

To this point, this Article has addressed what is wrong with an ideological selection process. It has argued that the President's nomination and the Senate's advice and consent functions may tread on the Appointments Clause, the separation of powers, and the Religious Test Clause when used to obstruct simple majority voting, secure outcomes in particular cases, or to support/oppose a nominee on the basis of her faith. It is unlikely, though, that such constitutional objections are justiciable. Of course, a President's and senators' Article VI obligations to support the Constitution do not turn on whether a case is justiciable. It may be that these actors have constitutional obligations that no litigant would have a right to enforce. The foregoing analysis, then, is principally precatory and hortatory.

But that is not to say nothing can be done to improve the nation's present judicial selection predicament. One unfortunate consequence of an ideological selection process is its impact on the judges of the inferior courts of the United States. Given the norm of prior federal appellate experience as a prerequisite to service on the Court, these lower court nominees have become the targets of interest groups, the President, and senators, all bidding to control the prospective pool of nominees who could eventually be elevated to the Court. What if these individuals could be appointed to the lower courts by a means other than the usual two-branch process of presidential nomination and senatorial advice and consent? What if the future talent pool for the Court could be sheltered from the worst excesses of a political selection process, one that both the President and the Senate may abuse? Below this Article examines the possibility of vesting the appointment of lower federal judges in the politically insulated federal judiciary.

---

<sup>190</sup> This fact may explain why some interest groups attempt to find a client senator or an umbrella organization to do their bidding.

<sup>191</sup> In theory, the federal recusal statute could provide litigants with a remedy against a partial adjudicator. 28 U.S.C. § 455 (2000). But this remedy might prove inadequate where the statute does not require recusal. Bootstrap motions to recuse on a prudential basis ('we fought your nomination, and now we fear that you will be biased against us') are unlikely to be met with much sympathy.

### A. *The Constitutional Permissibility of the Judicial Vesting Option*

A strategy that vests judicial selection in the federal judiciary involves three related constitutional issues. First, the arrangement must not avoid the terms of the Appointments Clause. Second, it must not run afoul of the executive and judicial vesting clauses. Finally, it must vest the appointing power with an appropriate authority.

#### 1. *Analysis Under the Appointments and Excepting Clauses: Who is an "Inferior Officer"?*

The Appointments Clause provides for presidential nomination with senatorial advice and consent.

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise Provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.<sup>192</sup>

The rule of presidential nomination and Senate advice and consent governs the appointment of the enumerated officers: "Ambassadors," "other public Ministers and Consuls," "judges of the supreme Court," and those officers falling within the catch-all category—"all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law."

That rule is merely a default with respect to the "inferior" "Officers of the United States," a subset of the catch-all category. The excepting provision of the Appointments Clause, or so-called "Excepting Clause,"<sup>193</sup> provides as much. "[B]ut the Congress may by Law vest the Appointment of *such inferior Officers*, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."<sup>194</sup> Congress may opt out these "inferior Officers" from the two-branch process and vest the appointing power elsewhere. Whose appointments may be vested elsewhere? The

---

<sup>192</sup> U.S. CONST. art. II, § 2.

<sup>193</sup> Although multiple constitutional provisions state a general rule and then provide for an exception, the excepting provision of the Appointments Clause alone has the distinction of being labeled "*the Excepting Clause*." *Morrison v. Olson*, 487 U.S. 654, 675 (1988).

<sup>194</sup> U.S. CONST. art. II, § 2 (emphasis added).

phrase, "such inferior Officers," refers to the "inferior Officers" subset of "all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law."<sup>195</sup> Thus, the catch-all category encompasses both "inferior Officers," to whom the Excepting Clause may apply, as well as non-inferior or "principal" officers.<sup>196</sup>

*a. The Judges of the Inferior Courts as "Inferior Officers"*

The text of the Constitution strongly suggests the judges of the inferior courts—U.S. District Court and U.S. Courts of Appeals judges—are "inferior Officers." The Appointments Clause provides that the President nominates and, subject to Senate advice and consent, appoints the "Judges of the supreme Court."<sup>197</sup> By its own terms, that phrase does not encompass all federal judges,<sup>198</sup> only Supreme Court justices. Moreover, Article III uses "Judges . . . of the supreme Court" in contradistinction to "Judges . . . of the . . . inferior Courts."<sup>199</sup> Because the Framers distinguished between Supreme Court justices and lower court judges, the Clause's sole enumeration of "Judges of the supreme Court" does not extend to "Judges of the inferior Courts."

Some commentators have suggested that the Framers intended the Appointments Clause to subject all judicial confirmations to a two-branch appointments process.<sup>200</sup> This argument relies on the fact that the early proposals and drafts of the Appointments Clause enumerated "inferior

---

<sup>195</sup> *Id.*

<sup>196</sup> Neither the Appointments Clause nor the Excepting Clause uses the term "principal," in contradistinction to "inferior officer," but the Court's cases interpreting the clauses adopt that terminology. *See, e.g.,* Buckley v. Valeo, 424 U.S. 1, 132 (1976). During the Federal Convention, Madison instead used the term "superior" as a synonym for "principal" and antonym of "inferior." 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 627 (rev. ed. 1966).

<sup>197</sup> The Constitution uses the term "justice" to describe a "judge of the supreme Court" only when referring to the "Chief Justice," a title described in Article I, Section 3.

<sup>198</sup> *But see* Freytag v. C.I.R., 501 U.S. 868, 884 (1991) (Blackmun, J.) (paraphrasing inaccurately the Appointments Clause as if it read "judges" *simpliciter* and listing the "heads of departments" among those officers who must be appointed by presidential nomination, followed by advice and consent).

<sup>199</sup> U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior . . .").

<sup>200</sup> Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 EMORY L.J. 527, 566 & n.188 (1998); Gordon Bermant et al., *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 MISS. C. L. REV. 319, 342 & n.76 (1994).

tribunals,” not “Judges of the supreme Court.”<sup>201</sup> Essentially, the argument suggests that the Framers’ pregnant silence as to why they adopted the final language suggests the change was not consequential, or else it would have provoked more discussion. Instead, it may have been a last-minute stylistic error that unintentionally transformed what had actually been intended. This argument’s weakness is immediately apparent. Typically, adjudicators prioritize a constitutional text’s plain meaning over prior inconsistent language in the drafting history, unless the final language is ambiguous. The final language the Framers actually settled upon and that the state ratifying conventions adopted was “Judges of the supreme Court,” not “inferior tribunals.” “Judges . . . of the supreme . . . Court[]” does not admit of multiple interpretations, especially where elsewhere it is used in contradistinction to inferior court judges.<sup>202</sup> Moreover, reliance on the convention record’s silence does not bear the heavy weight placed on it. It could as fairly be inferred from the silence that the adoption of the final language, “Judges of the supreme Court” rather than “inferior tribunals,” intended to limit the two-branch process to only Supreme Court confirmations.

Instead, lower court judges seem most naturally to fall within the catch-all category of the Appointments Clause: “all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.” First, a lower court judge is not a “Judge of the supreme Court,” or any of the other officers enumerated in the Appointments Clause. A lower court judge’s appointment is “not herein otherwise provided for . . .” Second, Congress has established the inferior courts by law.<sup>203</sup> The Madisonian Compromise resolved the Framers’ impasse over whether the Constitution should provide for inferior courts of the United States by granting Congress the power to “establish” them by law, but not calling for these courts in the Constitution itself—i.e. not making the inferior courts self-executing obligations.

Beyond the text of the Appointments Clause itself, Article III, which uses the same constitutional lexicon as Article II,<sup>204</sup> describes the “supreme”

---

<sup>201</sup> Tobias, *Federal Judicial Selection*, *supra* note 200; Bermant, *supra* note 200; *see also* 1 FARRAND, *supra* note 196, at 119–21, 126–28, 224–26, 230–31; 2 FARRAND, *supra* note 196, at 37–39, 41–46, 71–83, 539–40, 599–600.

<sup>202</sup> U.S. CONST. art. III, § 1.

<sup>203</sup> *Id.* (“The judicial Power of the United States, shall be vested . . . in such inferior Courts as the Congress shall from time to time ordain and establish.”).

<sup>204</sup> For example, Article II enumerates “Ambassadors, other public Ministers and Consuls” and specifies how they are to be appointed. U.S. CONST. art. II, § 2. That phrasing exactly tracks the enumerated jurisdictional grant of Article III extending the judicial power “to all Cases affecting Ambassadors, other public Ministers and Consuls,”

Court's authority hierarchically in relationship to the "Judges . . . of the . . . inferior Courts."<sup>205</sup> In *Edmond v. United States*, the Court explained that, at a minimum, to be an inferior officer one must be subordinate: "whether one is an 'inferior' officer depends on whether he has a superior."<sup>206</sup> If "directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate," one has a superior.<sup>207</sup> Complete control is not required. Although one lower court case suggested in obiter dictum that appellate review and the promulgation of procedural rules by a higher court did not constitute supervision of an "inferior" judge such that the judge would be an "inferior officer,"<sup>208</sup> *Edmond* concluded that appellate review and rules made by a higher authority constituted supervision of Court of Criminal Appeals judges and that they were therefore "inferior officers."<sup>209</sup>

Similarly, *In re Sealed Case*, the *Morrison v. Olson* challenge to the constitutionality of the independent counsel during the appeal to the D.C. Circuit, distinguished between administrative and judicial supervision and asserted only administrative supervision constituted that direction and supervision necessary to make one an "inferior officer."<sup>210</sup> There is good

---

a phrase repeated verbatim (twice). The parallel language suggests those phrases should have parallel interpretations. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 789 (1999). *But see Ex Parte Gruber*, 269 U.S. 302, 303 (1925) (Sutherland, J.) (describing the Article III grant of jurisdiction as applying only "to diplomatic and consular representatives accredited to the United States by foreign powers, not to those representing this country abroad," but entirely failing to acknowledge the same phrase in Article II concerning the appointment of *representatives of the United States*).

<sup>205</sup> AKHIL REED AMAR, *AMERICA'S CONSTITUTION* 209 (2005) (noting "supreme" is an adjective modifying "Court," describing its relationship with the "inferior Courts" and not a title describing its relationship with the two other branches of government).

<sup>206</sup> *Edmond v. United States*, 520 U.S. 651, 662 (1997). This subordination formulation of "inferior officer" abandoned the four "factors" considered in *Morrison v. Olson*, 487 U.S. 654, 671-72 (weighing removability, limited duties, limited jurisdiction, and limited tenure to conclude independent counsel was an "inferior officer"). *Edmond* did not expressly overrule *Morrison*, but appeared simply to distinguish it as not having articulated any "definitive test." *Edmond*, 520 U.S. at 661-62 (Scalia, J.).

<sup>207</sup> *Edmond*, 520 U.S. at 663.

<sup>208</sup> *In re Sealed Case*, 838 F.2d 476, 483 n.14 (D.C. Cir. 1988), *rev'd sub nom.* *Morrison v. Olson*, 487 U.S. 654 (1988) (speculating in obiter dictum in a case reversed on appeal).

<sup>209</sup> *Edmond*, 520 U.S. at 664.

<sup>210</sup> *In re Sealed Case*, 838 F.2d at 483 (stating in obiter dictum that lower federal court judges are principal officers because they "are not subject to personal supervision. The Supreme Court, in the exercise of its power to affirm, reverse, or modify, supervises cases—not judges who, appointed for life, are in a supervisory sense not inferior to

reason to doubt that distinction. First, in 1997, *Edmond* made clear it is the supervision of a subordinate's *work*, not one's person, that makes one an "inferior officer."<sup>211</sup> The jurisdiction of lower federal courts extends to deciding cases and controversies, which decisions are subject to appellate review. Their work can be affirmed, reversed, vacated, and the judges directed by instructions on remand. If judges disobey or err again, then they can be corrected on yet another appeal up the judicial hierarchy. Thus, the principal work product of inferior judges—their judgments and orders—is supervised.<sup>212</sup> This appellate review is supervision, at some level, of all that a district court or appeals court judge can do.

Second, the supervision need not be immediate and personal, but must exist at some level. While it is true that higher court judges do not have the authority to remove lower court Article III judges and they cannot prevent a lower court from exercising independent judgment, the effective supervision of judicial officers need not include removal. Congress and the courts have determined that several adjudicators with independence of judgment are "inferior officers": magistrate judges;<sup>213</sup> bankruptcy judges;<sup>214</sup> judges of the Coast Guard Court of Criminal Appeals;<sup>215</sup> military trial and appellate judges;<sup>216</sup> and special trial judges in the U.S. Tax Court.<sup>217</sup> Although there is disagreement in authority among the lower courts,<sup>218</sup> the Court has

---

anyone."); *see also Edmond*, 520 U.S. at 667 (Souter, J., concurring) (citing *In re Sealed Case*) (claiming in obiter dictum that lower federal court judges are not "inferior officers" because appellate review extends only to their judgments, not them personally).

<sup>211</sup> "[I]nferior officers' are officers *whose work* is directed and supervised at some level . . ." *Edmond v. United States*, 520 U.S. 651, 663 (1997) (emphasis added).

<sup>212</sup> Other tasks, such as the drafting of local rules, are also subject to review. Higher courts can strike down such rules to the extent they are inconsistent with the Federal Rules of Civil Procedure. *See, e.g., Dredge Corp. v. Penny*, 338 F.2d 456, 462 (9th Cir. 1964) (finding a district court's local rule to be inconsistent with Rule 56).

<sup>213</sup> *See, e.g., Pacemaker Diagnostic Clinic of Am., Inc. v. Instrumedix, Inc.*, 725 F.2d 537, 545 (9th Cir. 1984) (en banc) (upholding the appointment of magistrates judges by U.S. District Courts).

<sup>214</sup> 28 U.S.C. § 152(a) (2000).

<sup>215</sup> *Edmond*, 520 U.S. at 651.

<sup>216</sup> *Weiss v. United States*, 510 U.S. 163 (1994).

<sup>217</sup> *Freytag v. C.I.R.*, 501 U.S. 868, 868 (1991).

<sup>218</sup> At least one lower court has held that the Chief Judge of the Tax Court, an Article I judge, was not an inferior, but principal, officer of the United States. *Samuels, Kramer & Co. v. Comm'r*, 930 F.2d 975 (2d Cir. 1991). The Court has noted that such a holding remains an unsettled question. In *Weiss*, Justice Souter, concurring alone, characterized *Freytag* as having held that the Chief Judge of the Tax Court was a principal officer. *Weiss*, 510 U.S. at 192. But the eight-justice majority in *Edmond* went out of its way to rebuff that characterization. *Edmond v. United States*, 520 U.S. 651, 665

established that adjudicators with substantial independence may still be "inferior officers."

Still, subordination to a superior might not be enough by itself to render one an inferior officer. In *Morrison*, Scalia's dissent suggested that subordination to a superior officer might simply be a necessary, but not sufficient, condition for being an "inferior officer."<sup>219</sup> His suggestion stems from a statement by James Madison. In response to Gouverneur Morris' proposal to add the Excepting Clause, Madison doubted its necessity, but also thought its scope too limited. "[The Excepting Clause] does not go far enough if it be necessary at all—*Superior Officers below Heads of Departments* ought in some cases to have the appointment of the lesser offices."<sup>220</sup> The proposed Excepting Clause had provided, and was adopted in the same form, that "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."<sup>221</sup> So, according to Madison, another category of potential appointers should have been permitted beyond the "President Alone, the Courts of Law, and the Heads of Departments," viz., superior officers below heads of departments. Madison's statement problematizes subordination as the *sine qua non* of inferior officerhood because it identifies a class of officers, "Superior Officers," that is, principal officers, as nonetheless subordinate ("*below* Heads of Departments"). Thus, in response to the statement, Scalia qualified his position—that to be an inferior officer is to be a subordinate—by saying that subordination might be necessary, but not sufficient, to inferior officer status.

Madison's statement might not be entitled to as great weight as Scalia appeared to have given it. After all, Madison's proposed amendment to the Excepting Clause was never adopted. Its rejection could mean the other Framers rejected not only Madison's proposed extension of the appointment power to another class of persons, but also his proposal's suggestion that there was such a thing as "Superior Officers below the Heads of Departments." The convention record is silent on the reason for rejection. But on the other hand, his statement without any context as to the reason(s) for rejection does not deserve great deference as a clarification of the Clause actually adopted and the subordination principle's relationship to classification as an inferior officer.

---

(1997) ("*Freytag* does not hold that Tax Court judges are principal officers; only the appointment of special trial judges was at issue in that case.").

<sup>219</sup> *Morrison v. Olson*, 487 U.S. 654, 722 (1998).

<sup>220</sup> *Id.* (Scalia, J., dissenting) (citing 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 627 (rev. ed. 1966)) (emphasis added by citation).

<sup>221</sup> U.S. CONST. art. II, § 2.



Assuming, arguendo, Madison's statement that there can be subordinate principal officers is authoritative, what is the distance that remains between necessity and sufficiency, between subordination and "inferior officer" status? One possibility is that to be an inferior officer, one must be subordinate (the necessary condition), but cannot be one of the named, enumerated officers in the Appointments Clause ("Ambassadors, other public Ministers and Consuls"), as these officers, if considered "principal officers,"<sup>222</sup> are "subordinate" to the President (the sufficient condition).

The Court has needlessly complicated the issue by not expressly overruling *Morrison v. Olson* when it revisited the subordination principle in *Edmond*. For example, lower courts attempting to harmonize the two cases have concluded that subordination is a sufficient, but not a necessary condition to being an "inferior officer."<sup>223</sup> In *Morrison*, the Court held the independent counsel was an "inferior officer,"<sup>224</sup> even though she was not subordinate to the Attorney General. Thus, it appeared that subordination was not necessary to being labeled an inferior officer. In *Edmond*, the Court held, without overruling *Morrison*, that the Court of Criminal Appeals judges were "inferior officers" because they were subordinate.<sup>225</sup> Thus, the fact of subordination appeared to be sufficient for a determination that one is an

---

<sup>222</sup> Occasionally, the Court has taken the "inferior"/principal distinction invited by the final catch-all category and used its terminology to denominate as "principal" those officers specifically enumerated in the Appointments Clause—i.e. "Ambassadors, other public Ministers, and Consuls." *Freytag v. C.I.R.*, 501 U.S. 868, 919 (1991). The supposition is that, surely, if one is an officer important enough to be enumerated, one is a principal officer. (Alternately, the assumption may be that if one is enumerated, one is by definition a principal officer.) This facile but erroneous move has cast needless doubt on the validity of the subordination principle as both a necessary and sufficient condition rendering an officer of the United States "inferior." After all, consuls are a subordinate or inferior rank of ambassadors, 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, ch.38, § 1519, 372 (Boston, Hilliard, Gray, and Company 1833), thereby suggesting that if a "principal" officer, such as a consul, who is subordinate, is listed, one could be a principal officer while yet being subordinate, or otherwise put, that subordination is neither a necessary nor a sufficient condition of being a principal officer.

Instead, enumeration is not a distinction between principal and inferior offices. It may be a distinction between self-executing versus non-self-executing offices. The Appointments Clause enumerates those offices the Constitution authorized by its own terms—that is, the self-executing offices. By contrast, those offices in the 'catch all' category are non self-executing offices, that is, those that would need to be created by Congress by further act ("whose Appointments are not herein otherwise provided for, and which shall be established by law").

<sup>223</sup> *United States v. Hilario*, 218 F.3d 19, 25 & n.4 (1st Cir. 2000); *United States v. Gantt*, 194 F.3d 987, 999 n.6 (9th Cir. 1999).

<sup>224</sup> *Morrison v. Olson*, 487 U.S. 654, 672 (1998).

<sup>225</sup> *Edmond v. United States*, 520 U.S. 651, 662–65 (1997).

inferior officer. To reconcile the two, the lower courts have said that subordination may not be a *sine qua non* of an inferior officer, but if they are subordinate, that is sufficient to render one an "inferior officer."<sup>226</sup> This position exactly turns on their heads the positions of Justices Scalia and Souter, who although having espoused different approaches to the issue of "inferior officers," both expressed in a dissent and a concurrence, respectively, that the subordination principle is a necessary, but not a sufficient condition.<sup>227</sup>

b. *Objections to Judges of the Inferior Courts as "Inferior Officers"*

One fountainhead of opposition to the claim that inferior court judges are "inferior officers" is Joseph Story's oft-cited say-so in his legal magnum opus, *Commentaries on the Constitution*. There, Story asserted that "the practical construction" of "inferior officer" had "uniformly been that [inferior court judges] are not such inferior officers."<sup>228</sup> Justice Souter and other commentators have appealed to Story's authority to conclude judges of the "inferior courts" are not "inferior officers" within the meaning of the excepting provision.<sup>229</sup>

The major problem with reliance on Story's assertion is no court had (or has) ever addressed the issue. Story himself acknowledged as much. "Whether the Judges of the inferior courts of the United States are such inferior officers . . . is a point, upon which no solemn judgment has ever been had."<sup>230</sup> Thus, Story's suggestion can be read only as asserting that because Congress had never attempted to opt out inferior judges from the presidential nomination-senatorial advice and consent model, it did not "believe" it was authorized to do so. Such an inference without more is unwarranted. Congress has many powers that it did not exercise until almost a century after

---

<sup>226</sup> *Hilario*, 218 F.3d at 25 n.4; *Gantt*, 194 F.3d at 999 n.6.

<sup>227</sup> *Morrison*, 487 U.S. at 722 (Scalia, J., dissenting) ("To be sure, it is not a sufficient condition for 'inferior' officer status that one be subordinate to a principal officer."); *Edmond*, 520 U.S. at 667 (Souter, J., concurring) ("Having a superior officer is necessary for inferior officer status, but not sufficient to establish it.").

<sup>228</sup> 3 STORY, *supra* note 222, ch.38, § 1593, n.1.

<sup>229</sup> See *Weiss v. United States*, 510 U.S. 163, 191 n.7 (Souter, J., concurring) (citing Story in obiter dictum to support his claim that lower court federal judges are principal officers, but admitting in a footnote that the Court has never said so); Tobias, *Federal Judicial Selection*, *supra* note 200, at 566 n.189; Bermant, *supra* note 200, at 343 n.77.

<sup>230</sup> 3 STORY, *supra* note 222, ch.38, § 1593, n.1; see also *id.* at ch.37, § 1530 386 ("In the practical course of the government, there does not seem to have been any exact line drawn, who are, and who are not, to be deemed *inferior* officers in the sense of the constitution, whose appointment does not necessarily require the concurrence of the [S]enate.") (emphasis added).

the nation's existence. It was not until 1875 that Congress authorized general federal question jurisdiction for the inferior courts. That Congress did not act sooner to authorize that jurisdiction should not, by itself, be read as an inference of constitutional doubt about the authority to so legislate. Similarly, congressional inaction in opting out inferior court judges from the usual advice and consent process could suggest many things, including policy satisfaction with the status quo and its role of providing advice and, occasionally, withholding consent.

Moreover, it is hardly surprising that Congress had not attempted to vest the appointment of lower court judges within the judiciary itself. The early American national judiciary was a much smaller institution than the modern judiciary. Consequently, opting out of the default appointments process was not a practical exigency. Judicial nominations were fewer and less burdensome, particularly at a time when the Senate did not hold judicial confirmation hearings. From 1823–1833 (the ten-year period immediately prior to the publication of Story's *Commentaries*), the Senate had confirmed only twenty-two inferior court judges to the federal bench, or approximately two judicial confirmations per year. By contrast, during the two-year period of the 108th Congress, the Senate handled approximately 114 inferior court judicial confirmations, or approximately *fifty-seven judicial confirmations per year*, each nominee requiring a public hearing and testimony. Thus, for the President and Senate alike, the burden of nominating, advising, and consenting is much greater today than in Story's era. That Congress had not felt it necessary to exercise its options under the Excepting Clause likely reflected a policy judgment not to invoke the option rather than a doubt about its constitutionality. Congress is only now beginning to realize what a problem it has.

Similarly, statutes designating advice-and-consent as the means for confirming appeals and district court judges are not evidence that federal judges are "principal officers" requiring advice and consent for appointment.<sup>231</sup> These statutes do not imply that Congress must maintain a two-branch appointments process. They reflect simply a congressional policy judgment to retain advice and consent. Similarly, where Congress creates an inferior office and fails to provide for its appointment, those officers remain subject to the default rule of presidential nomination and Senate advice and consent.

Finally, the Court's precedents do not contradict the equation of U.S. Courts of Appeals and U.S. District Court judges with "inferior officers" of the United States. In *Buckley v. Valeo*, the Court struck down those statutory

---

<sup>231</sup> Bermant, *supra* note 200, at 343 n.77 (citing 28 U.S.C. §§ 44(a) and 133(a) as buttressing the proposition that the Appointments Clause requires advice and consent for Article III judicial appointments).

provisions creating the Federal Election Commission (FEC) as a violation of the Appointments Clause.<sup>232</sup> Congress attempted to vest the Speaker of the House and the Senate President Pro Tempore with the power to appoint some of the FEC members. The Excepting Clause, however, enumerates neither the Speaker of the House nor the Senate President Pro Tempore as possible recipients of the appointing power. The Court noted that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by [the Appointments Clause and Excepting Clauses]."<sup>233</sup> Because the FEC commissioners would wield "significant authority," they had to be appointed consistent with the Appointments and Excepting Clauses, which do not permit senators or representatives to be invested with the power to appoint inferior officers. By contrast, the Excepting Clause permits the "Courts of Law" to be vested with the power to appoint "inferior Officers of the United States." Thus, the Judicial Vesting Option does not present a *Buckley* problem.

The Judicial Vesting Option is consistent with *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*<sup>234</sup> The plurality decision struck down the Bankruptcy Act of 1978 as inconsistent with Article III. The Act's provisions created bankruptcy courts vested with the judicial power of the United States who did not enjoy the Article III protections of life tenure and salary protection and who were not subject to sufficient control by an Article III court.<sup>235</sup> By contrast, the Judicial Vesting Option does not propose vesting the judicial power of the United States in anyone other than an Article III judge enjoying life tenure and salary protection. It does not present a *Marathon* problem.

*Morrison v. Olson*, unlike *Buckley* and *Marathon*, is more problematic for the Judicial Vesting Option, but here too, not insurmountably. In *Morrison*, the Court upheld the independent counsel provisions of the Ethics in Government Act. It concluded that the independent counsel assigned to investigate then-Assistant Attorney General Ted Olson was an "inferior officer of the United States," such that Congress could rightfully vest the power to appoint her in the "Courts of Law." Chief Justice Rehnquist, writing for the majority, concluded *Morrison* was an inferior officer by balancing four factors that the Court identified: removability, duties, jurisdiction, and tenure.<sup>236</sup> Because the court characterized the independent

---

<sup>232</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

<sup>233</sup> *Id.* at 126.

<sup>234</sup> *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality).

<sup>235</sup> *Id.* at 60–61.

<sup>236</sup> *Morrison v. Olson*, 487 U.S. 654, 671–72 (1988).

counsel's duties, jurisdiction, and tenure as limited and because she was removable for good cause, the Court concluded she was an inferior officer.

If *Morrison*'s balancing test were applied to the Judicial Vesting Option, it is unlikely an Article III judge would be considered an "inferior officer" whose appointment could be vested in the judiciary. Judges are not removable except by impeachment; they exercise jurisdiction as broad as the judicial power may encompass with duties to match; and they enjoy tenure during good behavior. Thus, if *Morrison* remains good law in its interpretation of who constitutes an "inferior officer," the proposal for a Judicial Vesting Option would be constitutionally dead on arrival.

But the Court's deliberations in *Morrison*, as revealed by Harry Blackmun's posthumously available papers, suggest that in fact the Court's subsequent opinion in *Edmond v. United States* may have overruled, *sub silentio*, that aspect of *Morrison* which would potentially undermine the Judicial Vesting Option. Blackmun's conference notes in *Morrison* indicate that both Rehnquist and O'Connor had rejected Scalia's and the Solicitor General's argument that subordination to a superior was the *sine qua non* of inferior officerhood.<sup>237</sup> Although *Morrison* did not explicitly reject the subordination principle, it was implicitly rejected in favor of the functionalist balancing approach adopted in the case. In *Edmond*, however, Rehnquist and O'Connor backed down from their prior off-the-record rejections of subordination as the test for inferior officerhood. Instead, *Edmond* adopted the subordination principle. Moreover, Rehnquist, who had rejected the subordination principle in the *Morrison* conference, assigned Scalia, the sole *Morrison* dissenter, the task of writing the majority opinion in *Edmond*. That Rehnquist was the author of *Morrison* and was well aware of Scalia's adoption of the subordination principle and Rehnquist's prior rejection of it, suggests *Edmond* may have overruled *Morrison* on this point without saying so explicitly.<sup>238</sup> Thus, *Morrison* likely no longer presents any difficulty for the Judicial Vesting Option.

## 2. Analysis Under the Vesting Clauses

Even if the vesting of judicial appointments in the "Courts of Law" does not violate the Appointments Clause, it may still be necessary to ask whether

---

<sup>237</sup> *Morrison v. Olson* Conference Notes (Apr. 29, 1988), THE HARRY A. BLACKMUN PAPERS, Supreme Court File, 1918-1999, Box 507, folder 8, No. 87-1279 (Library of Congress) (noting under O'Connor's name "reject SG's subordinate proposition" and under Rehnquist's name "no buy SG's subordination argmt").

<sup>238</sup> See Jay S. Bybee & Tuan N. Samahon, *William Rehnquist, the Separation of Powers, and the Riddle of the Sphinx*, 58 STAN. L. REV. 1735, 1757-58 (2006) (suggesting Rehnquist's decision to assign the *Edmond* majority opinion to Scalia was an open invitation to rewrite what had been done in *Morrison*).

it violates the executive, legislative, and judicial vesting clauses. In *Morrison*, after concluding the Appointments Clause was not violated, the Court undertook a further “incongruity” analysis. It asked whether the interbranch vesting of the independent counsel’s appointment facially violated the separation of powers as expressed in the Vesting Clauses. The concern was whether the vesting of the appointments in the judiciary amounted to Congress encroaching on the other branches of government.

a. *Facial Constitutionality*

Unlike *Morrison*, the vesting of the appointment of lower court judges in the “Courts of Law” does not involve any “interbranch” appointment,<sup>239</sup> merely an intra-branch one—i.e. the “Courts of Law” selecting district court and appeals court judges. Thus, the concerns underlying inter-branch appointments are nonexistent with intra-branch appointments. First, the President has never enjoyed the power to control the courts, given Article III tenure and salary protection. Unlike executive appointments, where the Take Care Clause arguably requires that the President have the ability to remove executive officers, the President’s inability to nominate, appoint, and remove judges does not unduly interfere with the executive branch’s proper functioning. Moreover, the vesting of that power in the courts does not impermissibly usurp the President’s ability to nominate and appoint lower court judges because the Excepting Clause itself expressly authorizes Congress to reassign the appointment power.

Second, Congress would not encroach on the judicial power by authorizing the courts to appoint judges of the inferior courts. The judicial Vesting Clause grants the federal judiciary the judicial power, which includes the power to decide enumerated cases and controversies. That, however, is not the exclusive source of the judiciary’s power. The Excepting Clause permits Congress to grant the Courts the additional authority to appoint inferior officers within the Third Branch. The exercise of that authority is consistent with—not incongruous with—judicial duties to decide cases and controversies.

The appointing of judges does not facially involve the resolution of particular cases and controversies. Further, to the extent a judge is selected because other judges believe that he or she will vote a particular way on cases or controversies, tenure during good behavior will prevent the appointing judges from exercising any more supervision than already exists by way of appellate review. Moreover, the appointing of judges is a task

---

<sup>239</sup> See, e.g., *Freytag v. C.I.R.*, 501 U.S. 868, 883 (1991).

already undertaken by federal judges.<sup>240</sup> Finally, the selection of inferior judicial officers does not involve the exercise of a legislative function. This is significant because the exercise of a legislative function is considerably more incongruous with the judicial power than the mere exercise of an appointing power, and the judicial exercise of a legislative function by way of delegation has already been upheld.<sup>241</sup>

### *b. As Applied Constitutionality—Possible Issues*

In addition to a facial challenge to a vesting option, it is possible that there could be “as applied” challenges to the Judicial Vesting Option. For example, there might be situations where an Article III judge ceases to be directed or supervised at some level by the Court. When the Court is no longer able to supervise or direct lower courts by way of appellate review in a large field of cases, arguably a U.S. Circuit Court judge stops being an “inferior officer” and becomes a “principal officer.” Preclusion of appellate review might result from Congress broadly stripping the Court’s appellate jurisdiction.<sup>242</sup> Such concerns may largely be theoretical. If Congress does not trust the Courts enough to permit the exercise of judicial review, it is unlikely it would authorize simultaneously the Judicial Vesting Option. Nonetheless, it is at least arguable that some jurisdiction stripping schemes could affect the status of lower Article III judges as inferior or principal officers.

### *3. Analysis Under the Excepting Clause: Who Can Appoint?*

Under the Excepting Clause, Congress may designate one of three appointing authorities for inferior officers: the President alone, the Heads of Departments, and, most relevant to this Article’s proposal, “the Courts of Law.”<sup>243</sup> *Freytag* held that Article I courts, such as the U.S. Tax Courts staffed by judges without life tenure and salary protection, are “Courts of

---

<sup>240</sup> U.S. Court of Appeals judges select bankruptcy judges and U.S. District Court judges select magistrate judges.

<sup>241</sup> See, e.g., *Mistretta v. United States*, 488 U.S. 361, 405 (1989) (upholding the participation of federal judges on the Sentencing Commission as consistent with the separation of powers).

<sup>242</sup> The Court has not found a more limited scope of appellate review to transform an inferior officer into a principal one. *Edmond v. United States*, 520 U.S. 651, 665 (1997) (“[L]imitation upon review does not . . . render the judges of the Court of Criminal Appeals principal officers.”).

<sup>243</sup> U.S. CONST. art. II, § 2, cl. 2.

Law.”<sup>244</sup> *A fortiori*, the less constitutionally controversial Article III courts, where judges enjoy tenure during good behavior and salary protection, are also “Courts of Law.”<sup>245</sup>

Prior Congresses have interpreted Article III courts to be “Courts of Law” within the meaning of the Excepting Clause. For example, in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, the Court struck down the Bankruptcy Act of 1978 as unconstitutional on the ground that Congress had attempted to vest the judicial power of the United States in non-Article III courts lacking the safeguards and protections of salary protection and life tenure.<sup>246</sup> When Congress finally reauthorized a constitutionally acceptable bankruptcy code in 1984,<sup>247</sup> it confronted the practical and political dilemma of needing to appoint a large number of bankruptcy judges in a short period of time. The bottleneck of presidential nomination and Senate advice and consent would have greatly prolonged the appointments process and handed the Reagan administration an opportunity to fill the bankruptcy courts with like-thinking jurists. Instead, Congress invoked the Judicial Vesting Option and gave the U.S. Courts of Appeals, an Article III court, the power to appoint all the bankruptcy judges.<sup>248</sup> Similarly, Congress has vested the U.S. District Courts, Article III courts, with the power to appoint magistrate judges.<sup>249</sup> Thus, Congress has taken the position that Article III courts may wield the appointments power.

Who is an inferior officer and who may appoint are two separate analyses in Excepting Clause jurisprudence that have occasionally been conflated. *In re Sealed Case* assumed that because Article III courts are authorized to appoint inferior officers, they must themselves be subject to a two-branch appointment process.<sup>250</sup> Similarly, Justice Souter’s concurrence in *Weiss* assumed that the Article I tax court judges in *Freytag* must have been “principal officers” subject to a two-branch appointments process

---

<sup>244</sup> In fact, *Freytag* characterized Article I courts as “Courts of Law.” *Freytag v. C.I.R.*, 501 U.S. 868, 891 (1991).

<sup>245</sup> *Id.* (stating that district courts are “indisputably” “Courts of Law”); *id.* at 902, 907 (Scalia, J., concurring in part) (arguing that “Courts of Law” refers only to Article III courts and that the “structural accoutrements” of life tenure and salary protection “render the [Article III] Judiciary a potential repository of appointment power free of congressional (as well as Presidential) influence”).

<sup>246</sup> 458 U.S. 50 (1982) (plurality).

<sup>247</sup> Bankruptcy Amendments and Federal Judgeship Act of 1984, 98 Stat. 333 (2006).

<sup>248</sup> 28 U.S.C. § 152(a) (2000).

<sup>249</sup> 28 U.S.C. § 631(a) (2000).

<sup>250</sup> 838 F.2d 476, 481 (D.C. Cir. 1988), *rev’d sub nom.* *Morrison v. Olson*, 487 U.S. 654 (1988).



because they could appoint inferior officers.<sup>251</sup> The central confusion is the mistaken view that only principal officers may be vested with the power to appoint inferior officers. Alternately, it is assumed that if inferior officers can appoint other inferior officers, the appointing must be superior to the appointed.<sup>252</sup>

In *Freytag*, the majority disagreed with the first of these propositions. "Courts of Law" vested with the appointments power could be non-Article III courts, such as the U.S. Tax Court.<sup>253</sup> These non-Article III courts, as suggested by congressional vesting of the bankruptcy judges' appointments in the U.S. Courts of Appeals, are inferior officers. Thus, not only could Congress vest the appointment of circuit court judges in the Supreme Court, it could further vest the appointment of district courts in the circuit courts. Moreover, the supposition that inferior officers may appoint only officers still further inferior to them is not mandated by the text of the Excepting Clause. Thus, not only could Congress vest the court of appeals with the power to appoint district judges, it could vest district judges with the power to appoint court of appeals judges.

### B. *The Policy Desirability of the Judicial Vesting Option*

Although this Article has argued that the "Judicial Vesting Option" is constitutionally permissible, whether such a choice would be wise is another matter. Admittedly, the Judicial Vesting Option is a counterintuitive proposal. It places the proverbial fox in charge of the hen house with judges wielding the power to appoint other judges. Moreover, it does nothing to avoid the controversy over nominees to the Supreme Court; the Appointments Clause requires that they be subject to presidential nomination with senatorial advice and consent.

Yet, there are good reasons to take the proposal seriously. Below, this Article details how the Judicial Vesting Option might function and its advantages; the competing alternatives available under the Excepting Clause; possible objections to the Judicial Vesting Option; and the need for further research.

---

<sup>251</sup> *Weiss v. United States*, 510 U.S. 163, 192 (1994). In *Edmond*, the Court took the wind out of that assertion by explaining "that *Freytag* does not hold that Tax Court judges are principal officers; only the appointment of special trial judges was at issue in that case." *Edmond v. United States*, 520 U.S. 651, 665 (1997).

<sup>252</sup> *Freytag v. C.I.R.*, 501 U.S. 868, 919 (1991) (Scalia, J., concurring) (interpreting the Excepting Clause to mean that inferior officers would have to appoint lesser officers).

<sup>253</sup> *Id.* at 888 (Blackmun, J.).

### 1. *The Judicial Vesting Option*

Under the Excepting Clause, Congress could vest the appointment of inferior court judges in the "Courts of Law." Thus, Article III judges could appoint court of appeals and district judges. Congress has some flexibility with how the appointments are handled. It could elect to vest the power to appoint the judges of lower courts with hierarchically superior courts. For example, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984, which vested the courts of appeals with the power to appoint bankruptcy judges.<sup>254</sup> Similarly, Congress authorized district judges to appoint magistrate judges.<sup>255</sup> Thus, Congress could enact a statute that authorized the Court to appoint court of appeals judges. In turn, the court of appeals judges might be authorized to appoint the district judges within their respective circuits. Alternatively, Congress might elect to authorize the Judicial Vesting Option only for the numerous U.S. District Court judgeships on the theory that these appointments are less politically significant as courts that do not create precedent.

In addition, the Excepting Clause might be flexible enough to permit Congress to vest the power to appoint judges irrespective of hierarchy. That is, the district court judges might be authorized to appoint court of appeals judges, and simultaneously the court of appeals judges might be authorized to appoint the district judges.<sup>256</sup>

In selecting the judge, each regular, active status judge in the appointing court might be given a vote. After the court studies applicants for a vacancy on a lower or higher court, perhaps by way of an appointments committee, the collegial court could then vote as a body ye-a-or-nay on whether to appoint a particular candidate.

The chief advantage of the Judicial Vesting Option might be that Article III courts, enjoying salary protection and tenure during good behavior, are more insulated from exogenous political pressures than the President and the U.S. Senate. This insulation might permit the selection of excellent jurists, irrespective of their likely votes on legal outcomes favored by vying interest groups as these latter would be unable to influence life-tenured and salary-protected federal judges with reelection threats and campaign finance

---

<sup>254</sup> 28 U.S.C. § 152(a) (2000).

<sup>255</sup> 28 U.S.C. § 631(a) (2000).

<sup>256</sup> Other arrangements are possible, but are not elaborated here. For example, Congress could vest the appointments in the Judicial Conference as a whole, ensuring that the federal courts appoint nominees from a diverse, national pool.

contributions.<sup>257</sup> In addition, interest groups would be less likely to persuade jurists with hyperbolic media assertions and distortions of a prospective judge's prior advocacy or judicial service. Moreover, to the extent that the Judicial Vesting Option proceeds on a collegial basis—which favors consensus building—there is less concern that judges would have the presidential ability to pack the courts with a coherent, national ideological agenda. Nor would there be the same concern presented by senators attempting to thwart confirmations unless a nominee pledges allegiance to particular legal commitments. Of course, the process would not be apolitical, only potentially less political than the alternative of presidential nomination with advice and consent.

Another advantage of the Judicial Vesting Option is that judicial vacancies will be filled more expeditiously. This prospect could facilitate the dramatic expansion of the federal judiciary necessary to meet its modern caseload. Presently, confirmations in the Senate progress serially, cued one behind another, due to the bottleneck of nomination by one President and advice and consent by one Senate. Thus, a dispute between those two bodies can hold up confirmations across the country as nominees become subject to horse swapping and retaliation. Under one approach to the Judicial Vesting Option, appointments could progress in parallel. This benefit results from distributed processing of appointments across the nation. For example, an impasse in the Second Circuit concerning appointments to the Southern District of New York would not hold up the Ninth Circuit's simultaneous deliberation and appointment of judges to the Central District of California. In fact, Congress employed such a strategy when in 1984 it gave the U.S. Courts of Appeal the power to appoint over 230 federal bankruptcy judges nationwide, thereby avoiding the delay inherent in the two-branch appointment process. Moreover, the several "Courts of Law"—be it appeals courts or district courts—have a potent incentive to act expeditiously. No one is more concerned about judicial workload and backlog than federal judges. If courts appoint the judges, the process will be more nimble, avoiding the delay, bloviating, and grandstanding that senators, as politically accountable actors, engage in during televised hearings before constituents.

## 2. *The "President Alone" or "The Heads of Departments"*

The Judicial Vesting Option is not the only policy option under the Excepting Clause, at least if *Morrison v. Olson*'s holding permitting inter-branch appointments is still good law. Another option may be to vest the

---

<sup>257</sup> As a part of the legislative package exercising the Judicial Vesting Option, Congress might decide to insulate judges from pecuniary influence by disallowing or curtailing judicial, educational travel junkets paid for by private groups.

appointments power either in the "President alone"<sup>258</sup> or in the "Heads of Departments."

Such a process would roll the present rough-and-tumble of judicial confirmation fights into presidential elections with partisans recognizing that winning the presidency entails winning the sole ability to appoint the lower federal judiciary, assuming authorized vacancies. Such a proposal, as with all of the Vesting Options, would not change the advice and consent process for the heads of the judicial hierarchy, the "Judges of the supreme Court." These nominations would remain subject to the scrutiny of senatorial advice and consent. But the filling of lower court vacancies would become the President's sole domain. Moreover, those same Supreme Court justices would still retain appellate review of the inferior court judges appointed by the President alone.

This bundling of the stakes would eliminate any serious post-election fight over inferior court judges. Interest groups would focus their attention on winning or defeating presidential candidates rather than post-election, confirmation politics. Such a bundling might defuse political controversy over lower court appointments and increase presidential political accountability for poor selections. The *de minimis* scrutiny that most nominees to U.S. trial courts receive might not differ substantially from President-only selection.<sup>259</sup>

Yet, the major flaw of the "President alone" approach is that it treats the two-branch appointments process asymmetrically, as if it is "political" only when the Senate exercises its advice and consent prerogative. Although it eliminates the possibility that the Senate will frustrate the separation of powers, improperly consider race, religion, and sex, and cow judicial independence, it does not foreclose the possibility that the President will engage in any of these vices. It is not hard to imagine a President running on a plank that he or she will appoint only lower court judges willing to uphold (limit) abortion rights, find prohibitions on same-sex marriage constitutional (unconstitutional), etc. It may be that such a process does not differ much from the present rhetoric employed in presidential election campaigns, but executive vesting does affect the ability of a presidential nominee to deliver. This option might give an illusion that politics were drained from the process by removing the Senate's visible politics for each nomination. Such an option might be a less radical measure to include more democratic

---

<sup>258</sup> Although the text of the Constitution says that the appointing power could be vested in "the President alone," it seems improbable to exclude any presidential advisor from assisting the President, only that the final choice to appoint is the President's alone.

<sup>259</sup> There are exceptions. The nominations of Lawrence Block to the Court of Federal Claims and of Paul Cassell to the District Court for the District of Utah were contested.

involvement short of proposals to introduce direct election of judges.<sup>260</sup> But that there would be no political spectacle with the appointment of inferior court judges does not mean that the process would be apolitical, only that a President would enjoy a monopoly over the appointment spectacle.

Alternately, Congress could vest the appointments of lower court judges in the Heads of Departments. This approach, like the “President alone” vesting option, would roll much of the senatorial advice and consent politics over judicial confirmations into the presidential election. Unlike that approach, it would create a political dispute over the officer selected to pick judges, i.e. the head of department, the executive branch official who Congress might require to be appointed by its advice and consent. During that process, the Senate might exact demands with respect to selection criteria as a condition of confirmation. After confirmation, this head of department would continue to face political pressure from the President, to whom the head of department would be accountable, barring congressional insulation of the officer from removal for “good cause.”<sup>261</sup> The President would have an important say in directing the head of department, and might be permitted to remove him or her, but could not make decisions on behalf of the officer.

This procedure seems to retain most of the liabilities of an ideological selection process with comparatively little benefit. It does not avoid congressional politics because the head of department, unless he himself is exempted from Senate advice and consent, would be the subject of a confirmation. Moreover, once confirmed, the head of department would be subject to the President’s ability to remove his officers. Thus, the presidential vices of a political confirmation process would continue.

### *3. Policy Objections to the Judicial Vesting Option*

There are several serious potential policy objections to the Judicial Vesting Option. First, federal judges, like Presidents, senators, and interest groups, arguably exercise political will and not just judgment.<sup>262</sup> Judges may

---

<sup>260</sup> Cf. RICHARD DAVIS, *ELECTING JUSTICE* 169–78 (2005) (proposing a constitutional amendment to permit the direct election of the Court).

<sup>261</sup> This provision of the Appointments Clause might provide some insight into what type of unitary executive the Framers intended. If the appointments power is vested in a head of department but the head of department serves at the pleasure of the President, this option becomes mere surplusage and is evidence undermining those unitary executive theories that require a power to remove at will.

<sup>262</sup> THE FEDERALIST NO. 78 (Alexander Hamilton).

have ideologies and many of them are politically well connected.<sup>263</sup> Vesting them with the power to appoint federal judges may not insulate candidates for judicial office from all political considerations. Moreover, if vested with the appointments power, judges might become less judicious and more political.<sup>264</sup>

Assuming, arguendo, that the Judicial Vesting Option may be "political," it may be less so than the two-branch process. Without exogenous political pressures—threats of electoral retaliation and withheld campaign finance—judicial appointment will be comparatively apolitical.<sup>265</sup> There may be endogenous political pressures, viz., the judges' own ideological views. These views, however, may be somewhat mitigated by a collegial judicial appointment process that requires consensus and is not initiated by a President nominating a candidate for an up-or-down vote.

Second, although the Judicial Vesting Option may defuse some of the controversy over lower court appointees, it may increase further the stakes for Supreme Court appointees. To the extent that justices are vested with a power to appoint, the fight for their confirmations assumes a much more significant dimension. This objection might counsel against the vesting of appointing power in the Court.<sup>266</sup>

Third, vesting the appointment power in the Article III courts endows politically unaccountable actors with the ability to shape the future of the lower courts. Federal judges hold their offices during good behavior, which usually is equivalent to holding the office for life, and they enjoy a salary protected against congressional reduction.<sup>267</sup> If they make poor judicial selections, they cannot be sanctioned, and their poor judicial selections cannot be removed, except by impeachment. To the extent the means of

---

<sup>263</sup> Indeed, many lower court judges are appointed due to their amicable social relations with senators and Presidents.

<sup>264</sup> See generally *In re Charge of Judicial Misconduct or Disability*, 39 F.3d 374 (D.C. Cir. 1994) (addressing charges that Judge David Sentelle, by having lunch with Senators Faircloth (R-NC) and Helms (R-NC), acted improperly in the subsequent appointment of Ken Starr as independent counsel to the "Whitewater" investigation).

<sup>265</sup> See, e.g., Christopher E. Smith, *Merit Selection Committees and the Politics of Appointing United States Magistrates*, 12 JUST. SYS. J. 210, 215 (1987) ("The 'political' nature of the magistrate selection process relates primarily to the power struggles and value conflicts between judges within individual districts rather than the partisan affiliation and executive branch influence that infused the Carter era nominating commissions and judicial appointments.").

<sup>266</sup> The alternative would be vesting the appointment of circuit court judges with district court judges.

<sup>267</sup> *United States v. Will*, 449 U.S. 200, 220, 228–29 (1980) (holding Article III protects judges against congressional diminution of salary once a pay increase has vested, but it does not protect against inflation).

judicial selection is collaborative, it is also possible that a measure of personal accountability for poor appointments will be lost,<sup>268</sup> and the whole process may lack transparency. The two-branch appointment process may be the most effective check against jurocracy.

It is true that judges will not be politically accountable for individual appointments in the sense that they would not be reelected. Nonetheless, the whole process of “judges selecting judges” would remain accountable to Congress. Congress could repeal the legislation authorizing the Judicial Vesting Option at any time. Thus, the courts would generally enjoy political insulation in their appointment of judges, but their appointments would occur in the shadow of congressional repeal of the Judicial Vesting Option, making judges keen to avoid brazenly injudicious use of the appointments process. Admittedly, repeal once enacted would be difficult, because generally a statute is easier enacted than repealed. Moreover, Congress would likely act to repeal only when, taken as a whole, the poor appointments outweighed the good ones. But Congress would retain the more fine-tuned control of the power to create additional federal judgeships beyond those already authorized. Without judicial vacancies to fill, the Judicial Vesting Option is relatively valueless. Again, the ability to create new judgeships will give Congress as a collective institution, and not just individual representatives, a measure of oversight.

Finally, vesting the appointment of judges with other judges might harm judicial independence. In the federal judicial hierarchy, the judges of the inferior courts answer to higher court judges. But judicial independence is still valued. Congress would rightfully be concerned if the different levels of federal judges did not act somewhat independently of one another. It would be undesirable to create a Pygmalion effect, if that is what results from judicial appointments where judges appoint lower court judges in their own image by selecting only those candidates for judicial office who think, look, and rule just like them.<sup>269</sup> Such a phenomenon might suggest that the Judicial Vesting Option could have the tendency to freeze the adjudicative status quo to the period when it was first adopted. Similarly, it might suggest that judicially appointed judges might be reversed less often than they should.

If empirically demonstrable, this criticism might counsel against judicial selection of other judges. Even still, the Supreme Court’s appellate review

---

<sup>268</sup> “The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will, on this account, feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them.” THE FEDERALIST NO. 76 (Alexander Hamilton).

<sup>269</sup> See, e.g., Christopher E. Smith, *Who Are the U.S. Magistrates?*, 71 JUDICATURE 143, 145 (1987) (noting the propensity of U.S. District Court judges to select their former law clerks as U.S. Magistrate judges).

would direct all of the inferior courts, thereby providing some check against an exaggerated Pygmalion effect within any particular circuit.

#### 4. *The Need for Further Study*

As disclosed, there are countervailing considerations to assess in deciding whether judges ought to appoint other judges. How do judicially appointed judges compare with advice and consent appointments? Are they equal in quality and independence? Is the process that selects them faster than advice and consent? Are they broadly representative? Is the process as “political” or “ideological” as the advice and consent process, and if so, is the process “political” in a sense that jeopardizes judicial independence?

To answer the above, fruitful empirical comparisons could be made between judicially appointed specialty judges, viz., bankruptcy judges and magistrate judges, with specialty judges appointed by presidential nomination and advice and consent, such as U.S. Court of Federal Claims judges and U.S. Tax Court judges.<sup>270</sup> For example, “quality” could be gauged by using various *ex ante* and *ex post* measures of judicial quality and comparing those measures with the advice and consent appointments.<sup>271</sup> Similarly, one could assess “judicial independence” by comparing the “ideology” of the appointing judges with the “ideology” of the appointed judges.<sup>272</sup> In addition, qualitative empirical study could inform policymakers whether judicial selection by judges is as “political” as the advice and

---

<sup>270</sup> One might also compare the judicially appointed judges to the Court of International Trade judges. Unlike Federal Claims Court and Tax Court judges, the International Trade judges enjoy Article III tenure. The comparison would not be apples-to-apples (life-tenured to non-life-tenured), but might yield interesting comparisons, particularly if non life-tenured judges, who were judicially appointed, turned out to be better qualified than life-tenured ones who were appointed by advice and consent.

<sup>271</sup> For example, *ex ante* measures could operationalize “quality” by employing ABA ratings, Martindale-Hubbell peer review ratings, years of experience, as well as education and professional attainments. Similarly, *ex post* measures could include, among others, judicial output, anonymous review by counsel, expert survey responses, etc. *See generally* Stephen Choi & Mitu Gulati, *A Tournament of Judges?*, 92 CAL. L. REV. 299 (2004); Symposium, *Empirical Measures of Judicial Performance*, 32 FLA. ST. U. L. REV. 1001 (2005). *But see* Lawrence B. Solum, *A Tournament of Virtue*, 32 FLA. ST. U. L. REV. 1365, 1366 (2005) (questioning whether empirical measures of merit sacrifice “merit for measurability”).

<sup>272</sup> To the extent the appointment is to be made by a collegial body of judges (e.g. a Circuit Court), this comparison might be achieved by first averaging the imputed ideology of the appointing judges to create a composite ideology measure. Second, the ideology of the appointed judge could be quantified based on the coding of his or her votes in certain types of cases.



consent process and what reforms might be required before Congress authorizes broader authority to appoint other categories of judges.

## VI. CONCLUSION

Ideological selection is undesirable because it runs afoul of several constitutional provisions. It may offend the Appointments Clause when filibustering senators use ideological selection to raise the number of votes required to confirm a nominee, imposing greater burdens than required by the Constitution. It may violate the separation of powers and Article V. Both the President and Senate, by attempting to secure outcomes in particular cases, may violate the separation of powers by encroaching on the exercise of the judicial power. Finally, both the President and Senate may violate the Religious Test Clause if they select or oppose judicial nominees on the basis of their faith or religious beliefs.

Moreover, there are subconstitutional reasons to avoid an ideological selection process. Because ideological scrutiny results in Presidents selecting either stealth nominees without paper trails or nominees who meet narrow criteria for ideological compatibility, they are less likely to be intellectually voluble and distinguished, particularly if they are selected during a time of divided government. In addition, ideological scrutiny may affect the diversity, candor, independence, and impartiality of those most likely to be considered for the Court, the judges of the U.S. Courts of Appeals.

This Article has advanced as a partial fix for the problem of ideological scrutiny an argument that the Excepting Clause would permit the political branches to opt out of the two-branch appointments process. Because the judges of the inferior courts are “inferior officers” of the United States, their appointments may be vested in the Article III judiciary. This Judicial Vesting Option is a merit-based approach to lower court judicial selection that would remove the President and Senate from the appointments process. Instead, life-tenured and salary-protected Article III judges, insulated from external politics, would appoint the lower court judges, promoting merit as the principal criterion for selection.

